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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1994

THE NASH COUNTY BOARD OF EDUCATION,

PETITIONERS

versus

THE BILTMORE COMPANY; BORDEN, INC.;
COBLE DAIRY PRODUCTS COOPERATIVE, INC.;
PET, INC.; AND FLAV-O-RICH, INC.,
FOR ITSELF AND AS SUCCESSOR IN INTEREST
OF UNITED DAIRIES, INC.,

RESPONDENTS

Petition for a Writ of Certiorari to the
United States Court of Appeals for
the Fourth Circuit

Hamrick & Hamrick
J. Nat Hamrick, Esq.
Counsel for Petitioner
P. O. Box 470
Rutherfordton
North Carolina 28139

QUESTIONS PRESENTED FOR REVIEW

Can the nebulous doctrine of privity be used to support a res judicata holding which deprived every school board in North Carolina of its right to seek treble damages under the anti-trust laws of the United States when the United States Court of Appeals held the school boards were not "parties" to the action relied on as a bar, which action was brought by the Attorney General of North Carolina.

1st. Seeking to enjoin the defendants from violating the state anti-trust laws and to recover damages for the state itself;

2nd. Seeking to represent all the school boards of North Carolina as their class representative for the purpose of recovering treble damages for them;

AND WHEN the action was terminated by a consent injunction, signed by the state only, requiring the defendants to refrain from violating the North Carolina anti-trust laws in the future;

AND WHEN no notice was ever given to the school boards that action was pending, no settlement was ever discussed with them, no class was ever formed, no class notice was ever sent out, no money was recovered for them;

AND WHEN they did not consent to the injunction;

AND WHEN the Attorney General informed the defendants that he was settling the case on behalf of the state and was not settling the treble damage claim of the school boards and if they wished to bind the school boards, he would have to give the boards notice, form the class, and hold hearings on any proposed treble damage settlement for the school boards; (appendix p. 118)

And when the defendants replied that they did not wish to do this and would "take their chances on the treble damages claim"? (appendix p. 118)

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Nash County Board of Education v. The Biltmore Co., et al, 640 F.2d 484 (1981) (appendix page 41)

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GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED ARE:

1. The decisions below are in direct conflict of the case of Equal Employment Opportunity Commission v. D. H. Holmes Co., Ltd., 556 F. 2d 787, because Plaintiffs - all the city and county school boards in North Carolina who were potential class members were held to be bound under the theory of res judicata by the results of a case brought by the State of North Carolina in the State Court when no class was ever formed - no notice was ever sent out - no settlement was ever discussed with them and no money was recovered for them, and when they were named in the Complaint as class members and the Attorney General of North Carolina only sought to represent them as class representative. (Emphasis added).

2. The decision in this case is in direct conflict with the Lyons v. Westinghouse Corp., 222 F. 2d 184 (2nd Cir., 1955) cert.

den.345 U.S. 923, 73 S.Ct. 781, 97 L.Ed. 1354 (1953), and Cream Top Creamery v. Dean Milk Co., 383 F.2d 358 (6th Cir., 1967) because an action brought by the Attorney General of North Carolina in the state court under state law, and terminated by an injunction consented to only by the State, was held to bar plaintiffs from asserting a treble damage claim under the laws of the United States, when plaintiffs were not parties to the state action--had no notice of that action, and neither consented to the injunction nor received any money from that settlement.

3. The decisions below resulted in depriving every school board of North Carolina of their right to come into Court and have their anti-trust claim adjudicated in violation of their constitutional right and due process of law under the 5th Amendment and the Constitution of the United States.

(i) The date of the decision of the United States District Court for the Eastern

District of North Carolina is November 27, 1978, and is reported in 464 Fed. Supp. 1027, Civil Action No. 76-0188-CIV-S.

(ii) The date of the decision by the United States Court of Appeals for the Fourth Circuit is January 12, 1981, and is reported in 640 F.(2d) 484.

(iii) The date of the denial of the Petition to Rehear is February 19, 1981.

(iv) The statutory provision believed to confer on this Court's jurisdiction to review the judgment below by writ of certiorari is 28 U.S.C. 1254(1).

(f) The Constitutional provision and statutes which this case involves are:

Amendments V and XIV to the Constitution of the United States.

15 U.S.C. §1-15.

Rule 23 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The original jurisdiction of this action in the United States District Court for the Eastern District of North Carolina is based on the Anti-Trust Laws of the United States, 15 United States Code §1, 2, 15.

The Attorney General of North Carolina brought suit against the defendants under Chapter 75 of the North Carolina Statutes entitled "Monopolies, Trusts, and Consumer Protection."

In that suit he stated two causes of action:

1. He sought to enjoin the defendants from further violation of the North Carolina laws against price fixing and to recover damages for the state itself.

2. He sought to represent all the school boards of North Carolina as their class representative under Rule 23 of the North Carolina Rules of Civil Procedure entitled "Class Action." (appendix p. 87)

Before all the defendants had filed answers he settled the case on behalf of the State only by a consent injunction which required the defendants to refrain from violating the laws of North Carolina in the future. The consent order was signed for the State by the Attorney General and by the defendants. (appendix p.104)

The Attorney General did not purport to settle the treble damage class action for the school boards and so informed the defendants. He also told defendants that if they wished to settle the treble damage class action for the school boards he would have to give the school boards notice, form the class, and hold hearings on any proposed settlement of their treble damage class action. The defendants replied that they did not wish to do this and would take their chances on the treble damage class action of the school boards. (appendix p.118)

The Attorney General wrote the school

boards informing them of the injunction and stating that he had not settled their treble damage action. This was the first notice the school boards had of the Attorney General's action.

Later, the Nash County Board of Education brought the instant action under Rule 23 of the Federal Rules of Civil Procedure on behalf of itself and as class representative of all the school boards in the state.

The defendants pleaded res judicata. The District Court found that the school boards were "parties" to the State's former case and entered summary judgment for the defendants. The United States Court of Appeals for the Fourth Circuit affirmed, saying that the school boards were not "parties" to the former State case, but were in "privity."

When plaintiffs' petition to rehear was denied, this petition was filed.

ARGUMENT

Plaintiffs feel that an examination of the pertinent parts of the state's Complaint, the Consent Judgment, and the Complaint in this action will show that the Fourth Circuit was in error when it sustained defendant's pleas of res judicata.

The pertinent paragraphs of the state's action reads as follows:

"B. JURISDICTION AND VENUE

3. This is a civil antitrust action seeking permanent injunctive relief as provided for in G.S. §75-14 and money damages as provided in G.S. §75-16, against each of the defendants, jointly and severally, as named in paragraph 2 above. (appendix p. 87)

C. CLASS ACTION REQUESTED

4. (a) This action is brought on plaintiff's own behalf as a direct purchaser of fluid milk from the defendants and as one

of the sources of revenue used to pay part of the purchase price of fluid milk by the various public school systems of North Carolina; and as the class representative of a class of 'persons' described below, which have purchased fluid milk from the defendants, as is authorized by Rule 23(a), N.C. Rules of Civil Procedure. (appendix p. 87)

(b) The class of persons which have purchaed fluid milk from the defendants, which plaintiff seeks to represent in this action, in addition to itself, are described as follows: each public school system in this state . . . (appendix p. 88)

I. PRAYER

1. Wherefore, plaintiff prays:

(a) This action be tried before a jury.

(b) This action be determined a class action within Rule 23 of the N.C. Rules of Civ. Procedure...

(e) That plaintiff, and the class it represents, recover of the defendants treble damages for the injuries suffered by plaintiff and the class it represents, as provided for by G.S. §75-16..." (appendix p. 94)

The pertinent parts of the Consent Injunction reads as follows:

"IT FURTHER APPEARING to the Court that:

1. The State of North Carolina instituted this action pursuant to the provisions of G.S. 75-14, 75-15, and 75-16 and alleged violations of G.S. 75-1, 75-1.1, and 75-5... (appendix p. 97)

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby... (appendix p. 98)

CONSENTED TO:

STATE OF NORTH CAROLINA, ex rel.

RUFUS L. EDMISTEN, Attorney General

By: /s/ Rufus L. Edmisten

FLAV-O-RICH, INC.

JORDAN, WRIGHT, NICHOLS, CAFFREY & HILL, Attorneys

BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD, Attorneys

By: /s/ Welch Jordan" (appendix p. 104)

The pertinent parts of the instant Complaint read as follows:

"DESCRIPTION OF PLAINTIFF AND CLASS

1.

...(b) Plaintiff brings this action as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of itself and all other County and City Boards of Education as described in Chapter 115 of the General Statutes of North Carolina located in the State of North Carolina..." (app. p. 106)

The Petitioner respectfully calls to the attention of the Court some inadvertent mistak as to the facts which Petitioner believes may have led the Circuit Court to affirm.

On page 7 of the opinion, the Court said

that the Attorney General of the State of North Carolina was a party plaintiff, when in fact the State of North Carolina was a party plaintiff (Appendix, page 52). In its opinion, the Court states:

"The parties were, as we have already noted, 'every public school system in the state'." (Appendix, page 84).

This statement is in error, as is shown in the State's Complaint where the State says that it is bringing the action on its own behalf... and as "the class representative of the school boards". (Appendix, page 87).

This clearly shows that the State of North Carolina sought to represent the school boards only as their class representative under Rule 23 of the North Carolina Rules of Civil Procedure.

There is absolutely no contention that Rule 23 was complied with.

Rule 23(b) of the Federal Rules of Civil Procedure reads as follows:

"An action may be maintained as a class

action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests," (Emphasis added).

It is now perfectly apparent that the very thing that is sought to be prevented by the utilization of the class action happened in this case. The class representative, the State of North Carolina, even though it did its best to prevent the result which the

decision of the Courts below have produced by use of the nebulous doctrine of "privity," foreclosed all action by the city and county Boards of Education to recover millions of dollars illegally taken from them by the defendants' price-fixing agreements. This, in spite of the fact that the Boards of Education, who knew nothing about the State's action, are prevented from discharging their legal responsibility under North Carolina law as defined in North Carolina G.S. 115-31(a);

"A county or city board of education shall institute all actions, suits, or proceedings against officers, persons, or corporations, or their sureties, for the recovery, preservation, and application of all money or property which may be due or should be applied to the support and maintenance of the schools. . . ."

In addition to the obvious injustice of the opinions below, this case should be reviewed because it is in direct conflict with:

FIRST The rights of the plaintiffs under the Fifth and Fourteenth Amendments to the Constitution of the United States.

SECOND It is in direct conflict with the law and the public policy of the United States which unequivocally states that the jurisdiction to enforce the anti-trust laws of the United States resides exclusively in the courts of the United States.

This proposal is fully stated in the following cases. Judge Learned Hand's decision in Lyons v. West Corp., 222 F(2d) 184 (Second Circuit 1955), cert. denied, 345 U.S. 923, 73 Sup.Ct. 781, 97 L.Ed. 1354 (1955), where he states on page 189 of the Circuit Court decision:

". . . [T]he grant to the [federal]

districts courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere . . . two thirds of the recovery is not remedial and inevitably presupposes a punitive purpose. . . . There are sound reasons for assuming that such recovery should not be subject to the determinations of state courts. It was part of the effort to prevent monopoly and restraints of commerce; and it was natural to wish it to be uniformly administered, being rational in scope."

The Sixth Circuit in its opinion in Cream Top Creamery vs. Dean Milk Co., 383 F(2d) 358 (6th Circuit 1967) forcefully restates the same law on page 363 of that opinion:

"Assuming for the sake of argument that the complaints in the Cherokee case, the State Court action, and the Cream Top

case, the Federal Court action, allege the same basic wrongs, the decision of the District Court nevertheless cannot stand. Under 15 U.S.C. Section 15 Congress gave exclusive jurisdiction to the Federal District Court over wrongs committed under the Anti-Trust acts. . . .

It is apparent that the case relied on by the District Court, Englehardt vs. Bell & Howell Co., 327 F.(2d) at 30 (8th Circuit 1964), to support its holding in this case has no application to the facts of this case as is shown by the following quote from that opinion (page 35):

"[I]n Englehardt the plaintiff had brought three previous actions under the Missouri anti-trust statute against the same defendant. Each action had been removed to federal court. The cases were all dismissed, the third being dismissed with prejudice. . . .

"The court noted that in each of the four actions the parties and wrongs pleaded were identical. In upholding the lower court's dismissal on the basis of res judicata the appellate court noted that: 'We are not faced with the Lyons' problem here since all the early adjudications were made in the federal district court in actions over which the federal court had unquestioned jurisdiction. No issue of state court decisions fettering the power of the federal court to exercise exclusive jurisdiction in federal anti-trust actions is here presented.'" (emphasis added)

THIRD. It is in direct conflict with all the cases which so scrupulously protect the rights of absent class members. This is very lucidly set forth in Pettway v. American Cast Iron Pipe Co., 576 F(2d) 1157, rehearing denied, 581 F(2d) 267, cert. denied, 99 Sup.Ct. 1020, 439 U.S.

1115, 59 L.Ed. 74 (1978).

FOURTH. By its holding in this case the Court of Appeals has rendered an opinion which plaintiffs respectfully submit is against the public policy of the United States and against the facts of this case.

The federal anti-trust laws are among the most important laws in the United States. These legislative mandates form a basic framework for the American economic system. In light of this important public policy, oriented toward the prevention of monopolistic practices, it is important that courts strictly construe the doctrine of res judicata when considering the application of this doctrine against a litigant pursuing an action under these federal laws.

The importance of this policy on which federal anti-trust laws are grounded is discussed in Lawlor v. National Screen Service Co., 349 U.S. 322, 75 S. Ct. 865, 99 L.Ed. 1122 (1954), where the Court, in

rejecting the defense claim of res judicata on theory that the second suit involved the same class action as the first suit, stated that "particularly is this so in view of the public interest in vigilant enforcement of the anti-trust laws through the instrumentality of the private treble damage action." * (at 329, 869, 1128).

Lawlor, supra., seems to indicate that precise findings of same parties and same cuase of action must be made prior to the barring of an action under federal anti-trust law. Such precise findings were not made in the lower court's Memorandum in this cause. Indeed, that Memorandum is replete with question marks and ambiguities. Yet each uncertainty was resolved in favor of barring plaintiff's cause of action. This memorandum endows the Attorney General with more power than any statute or common law in North Carolina allows. This memorandum endows the Attorney General, by implication, with the intent to bar the plaintiff from further causes of action when no such intention is evident from any of the materials existing with reference to this issue. Each ambiguity present in this action has been resolved in favor of repressing the rights of this plaintiff to enforce federal anti-trust laws. This is true when, in fact, public policy demands that these laws be actively prosecuted.

See also the Annotation at 88 L. Ed. 389 which notes that res judicata should not be utilized to encourage the continued misuse of a patent privilege in violation of anti-trust laws and Addressograph v. Cooper, 156 F. 2d 483 (2d Cir., 1946).

In many instances, the Memorandum of the district court candidly admits that uncertainties exist as to whether, in fact, this plaintiff's action should be barred under the doctrine of res judicata. In finding that the Board of Education is the "same party" as the Attorney General, the court noted that despite the plaintiff's citation of statutes, caselaw and customary practices granting to boards of education the independent authority to sue and be sued, "principles of judicial restraint...require that the court read these provisions narrowly and give effect to the Attorney General's broad common law authority." (App. page 31). But plaintiff respectfully urges that such an ambiguity should be resolved in favor of due

process of law and federal policy favoring enforcement of the anti-trust laws. Furthermore, in the court's Memorandum no finding ever was made that the Attorney General indeed sought to represent the boards of education. Instead, based on a finding that the Attorney General had the authority to represent the boards of education, the Judge found that the boards were in fact so represented. (App. page 23). (Emphasis added).

With reference to whether this cause of action constitutes the same cause of action as was entertained by the Attorney General in state court, the district court acknowledged that not all criteria were met which should be examined in determining whether two cases, one under federal law and one under state law, constituted the same cause of action for the purposes of res judicata. However, again the court chose to "defer to what in this case are the more compelling dictates of res judicata" i.e. "the strong interest in finality". (App. page 20).

The public policy considerations of neither federal anti-trust laws nor res judicata are met in barring the litigation efforts of a a plaintiff who has never previously appeared before any court in vindication of its losses caused by another's violation of federal anti-trust laws.

It is apparent that the city and county Boards of Education could not be bound by the consent injunction because under Rule 23 of the North Carolina Rules of Civil Procedure is found the identical provision stated in Rule 23(e) of the Federal Rules of Civil Procedure, which provides:

"(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall

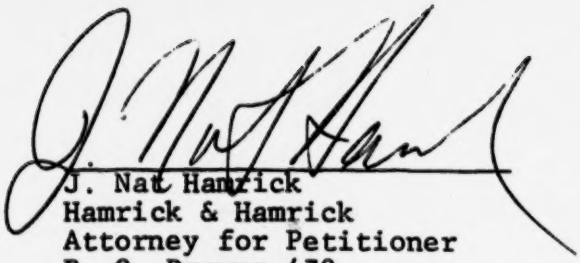
be given to all members of the class in such manner as the court direct."

CONCLUSION

It is respectfully submitted that no legalistic interpretations and distinctions should be allowed to leave millions of dollars of illegal gains in the hands of price-fixers who violated the anti-trust laws of the United States and gave absolutely nothing for the judgment they plead as res judicata except their promise not do it again.

The Anti-Trust Laws of the United States should not be rendered impotent by persons who coldly and clearly violate those laws - consent to an injunction - and they say they will "take their chances" rather than give fundamental due process to the school boards and children form whom they have illegally taken millions of dollars.

Respectfully submitted,



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Certificate of Service

This is to certify that the undersigned, a member of the bar of this Court, served this Petition for a Writ of Certiorari and Appendix thereto upon all of the parties to this action by depositing at least three copies of the Petition and three copies of the Appendix in the United States mail addressed to the attorneys whose names and post office addresses are:

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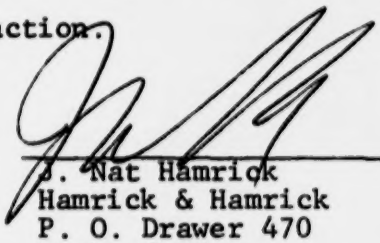
Entry of Appearance

J. Nat Hamrick, Attorney for Petitioner, does hereby enter his appearance in this Court for the purpose of representing Petitioner in this action.



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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

THE NASH COUNTY BOARD OF EDUCATION,	)	
Plaintiff,	)	
v.	)	Civil Action No. 76-0188-CIV-5
THE BILTMORE COMPANY, et al,	)	
Defendants.	)	

ORDER

For the reasons stated in the memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED and ORDERED that the motions of the respective defendants for summary judgment be, and the same are hereby granted, and they stand dismissed with their costs.

Let the Clerk send copies of this order to all counsel of record.

S/Robert R. Merhige
JUDGE PRESIDING

Dated 11/27/78

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

THE NASH COUNTY BOARD OF EDUCATION, Plaintiff,	)	Civil Action No. 76-0188-CIV-5
v.	)	
THE BILTMORE COMPANY, et al, Defendants.	)	

MEMORANDUM

Plaintiff, Nash County Board of Education (Nash County), a body politic created by the legislature of the State of North Carolina, brings this federal antitrust action seeking treble damages against nine defendant dairy companies that sell milk, ice cream, and cottage cheese to public schools in North Carolina. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of itself and all other county and city boards of education in North Carolina, as described in chapter 115 of the General Statutes of North Carolina. The nine defendants are: The Biltmore Company, a

Delaware corporation; Borden, Inc., a New Jersey corporation; Coble Dairy Products Cooperative, Inc., a North Carolina corporation, Dairymen, Inc., a Kentucky corporation; Maola Milk and Ice Cream Company, a North Carolina corporation; Pet, Inc., a Delaware corporation; Pine State Creamery Co., a North Carolina corporation; Kraftco Corporation, a Delaware corporation; and Flav-O-Rich, Inc., and its predecessor United Dairies, Inc., both North Carolina corporations.

Plaintiff alleges that the defendants, jointly and severally, have combined and conspired since no later than February 1, 1970 to fix prices and to monopolize and attempt to monopolize the public school market for milk, ice cream, and cottage cheese in North Carolina, in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Jurisdiction is appropriate under 15 U.S.C. § 15 and 28 U.S.C. § 1337..

Each of the defendants has moved for summary judgment on the sole ground that this

action is barred by the doctrine of res judicata. The sides have addressed the issues extensively in briefs and at oral argument, and the matter is now ripe for disposition. The undisputed facts show that in 1973, in response to complaints by various school boards, the North Carolina Attorney General's office began investigating the defendant dairy companies to determine whether they were fixing prices and dividing up markets in violation of North Carolina'a antitrust statute. On October 21, 1974, the Attorney General of North Carolina filed suit on behalf of the state in the General Court of Justice, Superior Court Division, of Wake County, North Carolina against the same nine dairy companies who are defendants in the instant suit. Alleging violations of the state (but not federal) antitrust statute, the Attorney General sought both injunctive relief and treble damages. Additionally, he sought certification, pursuant to Rule 23 (a) of the North Carolina Rules of Civil Procedure, to represent a class consisting of all public school systems

in North Carolina that had used state tax monies to purchase milk from any of the nine defendants.

The purported class was never certified, however, and the action never went to trial. Instead, the suit was terminated on May 12, 1975 by a consent decree entered by the presiding state court judge and endorsed by all parties. The consent decree represented that "all matters in controversy arising out of this action have been agreed upon and settled in a manner satisfactory both to the Plaintiff, State of North Carolina, and to the aforementioned Defendants." The consent decree provided injunctive relief in the form of mandatory procedures to be followed by the defendants over the ensuing three years for reporting to the state Attorney General all bids and negotiated prices for milk contracts with North Carolina public school systems. The decree, however, did not provide for any monetary damages, either for the state or for any of the school boards in the state.

On June 18, 1975, approximately one month after entry of the consent judgment, the North Carolina Attorney General sent a letter to all school superintendents and food service directors in the state, notifying them of the consent decree and its terms. The letter also contained the following paragraph:

> Additionally, it should be pointed out that the settlement in no way proscribes actions by individual school systems to recover monetary damages for overcharges that resulted from the rigging of bids.

Apparently acting on the Attorney General's letter, the Nash County Board of Education filed the instant suit against all of the defendants who were parties to the state court consent decree. Not surprisingly, the motion presently under consideration followed.

The principles of res judicata are well established. The general rule was stated by the United States Supreme Count in Commissioner v. Sunnen, 333 U.S. 591 (1948):

> The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment

> of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Id. at 597 (quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1876)). Thus, the doctrine of resjudicata bars relitigation when the prior suit (1) was on the same cause of action, (2) was between the same parties or their privies, and (3) was concluded by a final judgment on the merits. The Court finds that all three of these requirements are satisfied in the instant case.

I. The Same Cause of Action.

This inquiry has two facets. Reserving for the moment consideration of whether the cause of action in the instant suit is substantively the same as that in the North Carolina action, the Court must first resolve the threshold question of whether, notwithstanding all considerations of traditional res judicata

doctrine, federal district courts are bound to entertain all federal antitrust actions because Congress intended the district courts to have exclusive and mandatory jurisdiction over such lawsuits. Simply stated, the initial inquiry with which the Court is faced is whether, as a matter of federal-state relations, a suit in federal court under the Sherman Act is a fortiorari a different cause of action from a state court action under that state's antitrust statute, even if conventional notions of res judicata would otherwise bar the action.

Section 15 of Title 15 of the United States Code provides that, "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district where the defendant resides or is found or has an agent . . ." Nash County relies heavily on this provision, as several decisions of the federal courts interpreting it, in contending that this court must hear the instant suit.

The seminal decision in this area is Lyons v. Westinghouse Electric Corp., 222 F.2d 184 (2d Cir.), cert denied, 350 U. S. 825 (1955). In an opinion by Judge Hand, the court of appeals issued a writ of mandamus to the district court directing the judge to vacate the stay order he had issued in Lyons' antitrust suit against Westinghouse and another corporation. Id. at 190. The district judge had stayed the federal antitrust suit pending the resolution of a state contract action brought by Westinghouse against Lyons, as a defense to which Lyons pleaded that Westinghouse had violated the federal antitrust laws. Id. at 185. As the antitrust allegations raised by Lyons as a defense in the state court action against him were the same as those upon which he was sueing Westinghouse in the federal district court, the district court apparently decided to await the state court's decision on the merits, if any, of the antitrust claims. In a sweeping opinion, the court of appeals held that the district court acted inappropriately:

> In the case at bar it appears to us that the grant to the district courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere; at least on occasions, like those at bar, where the putative estoppel includes the whole nexus of facts that makes up the wrong. The remedy provided is not solely civil; two thirds of the recovery is not remedial and inevitably presupposes a punitive purpose.

Id. at 189. Judge Hand further justified the decision by asserting that uniform administration of the antitrust acts "would best be accomplished by an untrammeled jurisdiction of the federal courts." Id.

In the Court's view, Lyons differs from the case at bar in at least two respects. First, the federal plaintiff was a defendant in the state action. Accordingly, had the federal action been stayed pending resolution by the state court of the contract action, the federal plaintiff would have effectively been denied the opportunity to select a forum wherein to litigate his federal antitrust claims because of the collateral estoppel effect of the state court resolution. Second, this

denial might have proven to be unusually harsh because New York procedure, the state wherein the case was pending, would not have allowed him to prosecute his antitrust defense in the contract action in any fashion similar to the manner in which he could litigate his claims as a plaintiff in federal court. More importantly, treble damages would not have been available in the state court.

The instant plaintiff's situation is dissimilar from that which faced the plaintiff in Lyons. Nash County was, in the Court's view for the reasons that follow, a party plaintiff in the Attorney General's state antitrust action. It follows therefore that it cannot now be heard to say that it was denied a choice of forum. Moreover, the North Carolina antitrust enforcement mechanism almost completely mirrors its federal counterpart, especially with respect to the availability of treble damages. Compare 15 U.S.C. § 1 et seq. with N.C. Gen Stat. §§ 75-1 to -29.

Plaintiff has also directed the Court's attention to Cream Top Creamery v. Dean Milk Company, 383 F.2d 358 (6th Cir. 1967), where the Sixth Circuit Court of Appeals reversed the district court's award of summary judgment to the defendants in a private antitrust action. Id. at 364. The district court in that instance had entered summary judgment for the defendants on the grounds that a prior similar suit in state court between the same parties under the state's unfair competition laws was dismissed with prejudice by the state court. Id. at 361. Citing Lyons, the court of appeals noted that "[u]nder 15 U.S.C. § 15 Congress gave exclusive jurisdiction to the Federal District Court over wrongs committed under the anti-trust acts." Id. at 363. The court further observed that, "[s]ince the [state court action] did not and could not have involved a claim under the federal anti-trust statutes, the dismissal with prejudice could not have adjudicated [the defendants's] alleged violations of these statutes." Id.

It is possible to read the Sixth Circuit's opinion in Cream Top Creamery to say that, regardless of any similarity between the state and federal enforcement mechanisms, federal courts must always entertain federal antitrust actions because state courts lack jurisdiction to hear such actions. To whatever extent this was the intended meaning of the court of appeals, this court, most respectfully, cannot adopt it for the following reasons. First, because the alleged violations that were the basis of the federal action occured subsequent to the dismissal in the state court action, id, the causes of action were not the same. It follows therefore that it was unnecessary for the court of appeals to address the Lyons issue, and all references thereto stand as mere dicta. Second, this dicta is unsupported by any analysis of the distinctions between Lyons and the case that was then under consideration. Finally, in its discussion of Lyons the court observed that "[t]here seems to be some question as to whether [res judicata] is applicable when the

first forum lacks the ability to give the relief sought in the second forum." Id. This suggests conversely that res judicata should apply when the state antitrust mechanism does provide similar relief to that made available under the federal statutes. Although this position is inconsistent with a rule of mandatory federal jurisdiction in federal antitrust actions, which the Sixth Circuit initially seemed to be advocating, it is, in this court's view, the more reasonable approach.

Nash County contends further that Engelhardt v. Bell & Howell Co., 327 F.2d 30 (8th Cir. 1964), reinforces its position that 15 U.S.C. § 15 mandates that this court deny defendants' motions for summary judgment. In Engelhardt, the Eight Circuit Court of Appeals affirmed the district court's award to the defendant of summary judgment in a federal antitrust action on the ground that previous dismissals of the same cause of action by a federal district court constituted res judicata, even though the previous suits were

brought under the state's antitrust statute and thereafter removed to federal court under its diversity jurisdiction.

The court of appeals in that case noted that it was not faced with a Lyons problem because "all the earlier adjudications were made in the federal district court in actions over which the federal court had unquestioned jurisdiction. No issue of state court decisions fettering the power of the federal court to exercise exclusive jurisdiction in federal antitrust actions is here presented." Id. at 35.

Had the prior dismissal been by a state court, the Eighth Circuit would have faced essentially the same issue as that which is before this court. Nash County's reliance on Englehardt is misplaced, however, because it would be sheer speculation to conclude that the court of appeals would have reversed the district court if the prior dismissal had been made by a state court. At best, one can note that such circumstances would present a

different question.

For purposes of deciding such a question, perhaps the most relevant language of the opinion is the court's recognition that the "real problem in Lyons was not whether the causes of action are the same but rather the problem of whether for policy reasons an exception should be made to the general rule of finality of prior adjudications." Id. (Emphasis added). Couched in such terms, the Eight Circuit identified what the real inquiry should be in all cases such as the one now before the Court. The Court must go beyond a cursory reading of the decisions discussed above, for such a superficial review may suggest, incorrectly, that the Court ought to exercise jurisdiction regardless of what will later be shown to be the complete substantive identity between the suit at bar and the North Carolina case.

A closer analysis, however, of these cases as well as of some of the commentary inspired thereby, see e.g., Note, The Collateral Estoppel Effect of Prior State Court Findings in Cases

Within Exclusive Federal Jurisdiction, 91 Harv. L. Rev. 1281 (1978); Note, Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations, 53 Va. L. Rev. 1360 (1967), reveals that the factors underlying the rationale for recognizing an exception to the operation of res judicata principles in areas of exclusive federal court jurisdiction are not present in the instant case. Broadly speaking, unimpeded access to federal district courts in federal antitrust actions is meant to promote the following: (1) availability of treble damages; (2) access to trial by jury; (3) opportunity to proceed under the Federal Rules of Civil Procedure, especially the rules allowing expansive discovery; and (4) uniform judicial decisionmaking in the area of antitrust law through the application of the same statute by judges within the same court system.

The fulfillment of these goals does not require a per se rule in favor of mandatory federal court jurisdiction in antitrust cases.

Rather, each case should be analyzed with regard to the recognition of the rationale underlying exclusive federal jurisdiction. Where most of all of that rationale is satisfied, the Court is of the view that the principles of res judicata must be given traditional deference.

Because neither the cases not the commentary offer any helpful guidance regarding the relative importance of the various reasons for not giving res judicata effect in cases such as the instant one, the Court has balanced these goals against the policy behind the doctrine of res judicata in light of the circumstances of this case. This balancing process has convinced the Court that, because at least three of the four goals to which the Court has made reference have been fulfilled by the North Carolina case, and because of the strong policy favoring finality that lies at the heart of res judicata, it would be erroneous for the Court to permit this action to proceed soley because Nash County brings it under the Sherman Act.

The first three goals indentified above are completely fulfilled under North Carolina law. Section 75-16 of the General Statutes of North Carolina mandates that a successfull plaintiff in a state antitrust action recover "treble the amount fixed by the verdict." Additionally, regarding access to trial by jury, section 25 of article I of the North Carolina Constitution and Rule 38 of the North Carolina Rules of Civil Procedure provide for trial by jury upon timely demand by either party in all civil actions, and the record reflects that such a demand was made by the North Carolina Attorney General in the suit against the defendant dairy companies. Finally, the North Carolina Rules of Civil Procedure, including the discovery provisions, are virtually identical to the Federal Rules in substance as well as form.

North Carolina's antitrust enforcement mechanisms probably satisfy the requirements of the fourth goal as well, though perhaps not as completely as they do the first three. As

already noted, the federal and state statutes are quite similar. The principal distinction between the North Carolina statute and the Sherman Act is, of course, that the latter is implemented by the federal courts. The importance of this distinction, if any, is unclear, especially in light of the North Carolina Supreme Court's recognition that, "[section one] of our law is based upon section one of the Sherman Act, ...[and] the body of law applying the Sherman Act, although not binding upon this Court in applying [North Carolina's antitrust statute], is nonetheless instructive in determining the full reach of that statute." Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521, 530 (1970). It follows therefore, at the very least, that the North Carolina antitrust scheme is likely to yield results based upon and compatible with the resolution of antitrust cases by the federal courts.

Balanced against the rationale for exclusive federal court jurisdiction is the strong interest in finality that the doctrine of

res judicata is designed to promote. The reasons for preventing relitigation of issues that have been or could have been once fully adjudicated are too familiar to require recitation here. Suffice it to say the Court should recognize exceptions to the operation of res judicata only when the interests countervailing thereto are very strong indeed. Because the Court is satisfied that the North Carolina antitrust mechanisms adequately fulfill the goals underlying the need for unfettered federal court jurisdiction in such matters, the Court must defer to what in this case are the more compelling dictates of res judicata.

Turning now to the question of the substantive similarlity between the cause of action brought here by Nash County and the case filed by the North Carolina Attorney General, the Court finds the two to be the same for purposes of res judicata. The Attorney General alleged in his suit that the defendant dairy companies had fixed prices and allocated markets in

connection with the sale of milk, ice cream, and cottage cheese to the public school systems in North Carolina. The instant suit is virtually identical in that it seeks relief on account of precisely the same conduct by the defendants as that which gave rise to the Attorney General's suit. That the language of the two complaints differs in some respects is immaterial so long as the alleged liability producing conduct is the same.

II. The Same Parties.

Nash County argues most strenuously that the earlier state court litigation did not involve the "same parties or their privies" as are in the instant action. The precise question before the Court in this context is whether the North Carolina Attorney General had the authority to act on behalf of and bind Nash County, in addition to the other county and city school boards of North Carolina, in the action he filed under the state antitrust statute. That is, was Nash County a "party" in the prior litigation? A review of North

Carolina law, as reflected in both the statutes and the cases,[1] as well as an examination of various federal court decisions in this area, has satisfied the Court that the Attorney General did indeed have the requisite authority to represent the interest of the school boards so that, for purposes of res judicata, they were parties in the state court action.

The United States Court of Appeals for the Fifth Circuit has observed that, "[t]he office of attorney general is older than the United States." Florida ex rel. Sheven v. Exxon Corp., 526 F.2d 266, 268 (5th Cir. 1976), cert denied, 425 U.S. 930 (1977). The Court went on to note that:

> [A]ttorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires.

Id. (citations omitted). Because the common

law is in full force and effect in North Carolina, see N.C. Gen. Stat. § 4-1, and bearing in mind the axiom that statutes in derogation of the common law must be strictly construed, see Swift & Co. v. Tempelos, 178 N.C. 487, 101 S.E. 8 (1919), the Court must resolve any ambiguity in North Carolina statutory provisions defining the reach of the Attorney General's authority in favor of a broader scope consistent with the common law.

The North Carolina Constitution makes little reference to the authority of the Attorney General other than to note that his "duties shall be prescribed by law." N.C. Const. Art. III, § 7(2). These duties are generally set out it North Carolina General Statute § 114-2, which provides inter alia that the Attorney General shall "represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State." (Emphasis added). This section also grants the Attorney General the authority "to

institute and originate proceedings before [any] . . . courts, officers, agencies or bodies and . . . to appear before agencies on behalf of the State and its agencies and citizens in all matters affecting the public interest."

This broad grant of general authority as the state's legal representative is supplemented in the antitrust context by North Carolina General Statute §§ 75-14, -15 and -16, which provide as follows:

> § 75-14. Action to obtain mandatory order. - If it shall become necessary to do so, the Attorney General may prosecute civil actions in the anme of the State on relation of hte Attorney General to obtain a mandatory order, including (but not limited to) permanent or temporary injunctions and temporary restraining orders, to carry out the provisions of this Chapter, and the venue shall be in any county as selected by the Attorney General.
>
> § 75-15. Actions prosecuted by Attorney General. - It shall be the duly of the Attorney General, upon his ascertaining that the laws have been violated by any trust or public service corporation so as to render it liable to prosecution in a civil action, to presecute such action in the name of the State, or any officer or department thereof, as provided by law, or in the name of the State on relation of the Attorney General, and to prosecute all

officers or agents or employees of such corporations, whenever in his opinion the interests of the public require.

§ 75-16. Civil action by person injured; treble damages. - If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such perosn, firm or corporation so injured shall have a right of action on account of such case judgment shall be rendered in favor of the Plaintiff and against the defendant for trebel the amount fixed by the verdict.

The Attorney General brought the prior state court suit under these three provisions, seeking permanent injunctive relief under § 75-14 and monetary damages under § 75-16. The Attorney General was sueing on behalf of the state as a direct purchaser of milk from the defendants and as one of the sources of revenue used to pay part of the purchase price of milk bought from the defendants by the state's public school boards. He sued also as the purported class representative on behalf of the public school systems. As noted above, the consent decree in this action was entered before any class was certified.

Nash County's principal assertion in support of its position that, for purposes of res judicata, it is not the "same party" as the Attorney General rests on the premises that public school boards are not "State . . . agencies or other organized activities of the State which receive support in whole or in part from the State," see N.C. Gen. Stat. § 114-2, and therefore that the Attorney General lacked the requisite authority to act on the school board's behalf. Nash County offers various arguments in this regard premised on statutory as well as case law interpretations, which, unfortunately for it, are unpersuasive.

The Court notes at this juncture that it is largely irrelevant that the Attorney General brought his suit as a class action. That no class was certifed would assume relevance here only if the Court were to find that the Attorney General did not have the authority to act for the school boards. In that event, Nash County, or any other school board, could bring this action unimpeded by res judicata, subject

of course to any applicable restrictions of collateral estoppel. Because the Court's judgment is that the Attorney General and Nash County are the "same party," however, the purported class action status of the state case is immaterial to the instant inquiry.

Public school boards in North Carolina operate pursuant to the provisions of North Carolina General Statute § 115-27:

> The board of education of each county in the State shall be a body corporate by the name and style of "The . . . County Board of Education," and the board of education of each city administrative school unit in the State shall be a body corporate by the name and style of "The . . . City Board of Education." The several boards of education, both county and city, shall hold all school property and be capable of purchasing and holding real and personal property, of building and repairing schoolhouses, of selling and transferring the same for school purposes, and of prosecuting and defending suits for or against the corporation.

(Emphasis added).

Nash County contends that, because it is a "body corporate . . . capable of . . . prosecuting . . . suits," it is separated from the state sufficiently to prevent its falling within

the legal responsibilities of the Attorney General. In support of this contention, Nash County directs the Court's attention to North Carolina General Statute § 115-31, which provides that a county "board of education shall institute all actions, suits, or proceedings . . . for the recovery . . . of all money . . . which may be due to . . . the schools."

Perhaps the most persuasive argument for Nash County's position is grounded upon North Car-lina General Statute § 147-17, which forbids the retention of counsel (other than the Attorney General) by state agencies, departments, or other organized activities of the state supported partially or wholly by the state, without the approval of the Governor. This section also restates that portion of § 114-2 that provides that the Attorney General shall represent these entities, but it allows him to withdraw such representation when it is "impracticable."

Nash County correctly submits that § 147-17 prevents any of the listed governmental

entities, except in special circumstances, from hiring a lawyer and suing on its own behalf. From this premise Nash County concludes that, because §§ 115-27 and 115-31 authorize a school board to sue on its own behalf, the legislature therefore never intended that the language "State departments, agencies, . . . or other organized activities of the State" include local school boards insofar as such inclusion would allow the Attorney General to represent and bind the school boards in legal actions.

This conclusion assumes that the legislature could not have contemplated, indeed must have rejected, the notion that school boards could retain local counsel while at the same time remain within the general representational authority of the Attorney General. In the Court's view, herein lies the major infirmity of Nash County's position, for it can point to no authority that establishes conclusively that either the legislature intended or the state supreme court has interpreted these provisions

to preclude such joint representation. In the absence of such authority, principles of judicial restraint as well as considerations of federal-state comity require that the Court read these provisions narrowly and give effect to the Attorney General's broad common law authority.

In its brief submitted subsequent to the oral argument, Nash County directs the Court's attention to three decisions of the Supreme Court of North Carolina that it asserts to be dispositive of the "same parties" issue. In Branch v. Board of Education, 233 N.C. 623, 65 S.E. 2d 124 (1951), the North Carolina Supreme Court held that, absent certain special circumstances, a taxpayer could not sue the county school board to enjoin an allegedly unlawful expenditure of school funds and to compel a reallocation of those funds. In so holding, the Court noted that:

> [T]he right to sue for the protection or recovery of the school funds of a particular school administrative unit belongs by necessary implication to the governing body of that unit . . . Indeed,

> a relevant statute confers upon the county board of education in explicit terms the power to sue for the preservation and recovery of the money or property of the county administrative unit.

Id. at 625, 65 S.E.2d at 126.

Nash County's reliance on this language is misplaced, for the court held only that the school board, not the taxpayers, could sue to recover school funds. The Attorney General's authority indeed was not even an issue in the case. Nowhere did the court suggest, and only a dangerously expansive reading of Branch would support, the inference that the school board's authority to sue operates to cut back the Attorney General's statutory and common law authority to sue in the state's interest.

The two other cases cited to the Court both involve the applicability of North Carolina's Tort Claims Act to local school boards. See Clary v. Alexander County Board of Education, 285 N.C. 188, 203 S.E.2d 820 (1974); Turner v. Gastonia City Board of Education, 250 N.C. 456, 109 S.E.2d 211 (1959). These decisions hold that, for purposes of

vulnerability to suit under the Tort Claims Act, local school boards are not "state agencies", the sovereign immunity of which the Tort Claims Act has waived. Nash County concludes that school boards are therefore not "state agencies" for any purpose.

Once again, the plaintiff assumes too much. Limitations of sovereign immunity, such as that effected by state tort claims acts, because they operate to derogate the common law, must be construed narrowly. The Court accordingly is unmoved by Nash County's analogy to the North Carolina Tort Claims Act and the two cases cited. Indeed, the more persuasive argument to be made by analogy to the Tort Claims Act is that, because the North Carolina Supreme Court finds schools to be within the protective cover of sovereign immunity, such school boards are necessarily imbued with sufficient characteristics of the "state" to bring them within the reach of the Attorney General's authority under North Carolina General Statute § 114-2.

The decisions of various federal courts cupport, as a general matter, the Court's specific interpretation of North Carolina law in this regard. Far and away the most comprehensive examination of a state Attorney General's authority to represent individual organs of the state is Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976), Cert denied, 425 U.S. 930 (1977). In Shevin the Attorney General of Florida brought a federal antitrust suit against seventeen major oil companies on behalf of the state's various departments, agencies, and political subdivisions. Id. at 267. The defendants asserted that the Attorney General lacked the requisite authority to prosecute such an action absent the explicit approval of these state entities. In addition to the general remarks quoted earlier herein regarding the broad common law authority of a state Attorney General, the United States Court of Appeals for the Fifth Circuit noted that the "individual government instrumentalities involved have something to gain from this suit,

and nothing to lose but their causes of action (by way or res judicata or collateral estoppel)." Id. at 273; accord, Alabama v. Blue Bird Body Company, 71 F.R.D. 183 (M.D. Ala. 1976); Illinois v. Brunswick Corp., 32 F.R.D. 453 (N.D. Ill. 1963).

Like the Attorney General of Florida, the North Carolina Attorney General enjoys broad common law authority. Moreover, because of the absence of any explicit curtailments of this authority by the legislature or the state supreme court, the Court concludes that, by virtue of the Attorney General's participation in the prior state court antitrust action, Nash County was a "party" in that action for purposes of res judicata.

III. Final Judgment on the Merits.

The third component of res judicata is that the prior decision must have been resolved by a final judgment on the merits. There is no doubt that a consent judgment constitutes such a final resolution. 1B Moore's Federal Practice, ¶0.409[5], at

1026 (2d ed. 1974).

Nash County offers two reasons why the consent judgment in the prior state action should not be held binding on it for purposes of this litigation. First, Nash County points to the letter sent out to the school boards by the Attorney General, following entry of the consent decree, in which the Attorney General notified the school superintendents and food service directors of the consent decree. That letter additionally informed them that the settlement "in no way proscrib[ed] actions by individual school systems to recover monetary damages for overcharges" by the dairy companies. In this respect, the Attorney General was, in the Court's view, simply mistaken.

The terms of the consent decree are explicit. The state that "all matters in controversy arising out of this action have been agreed upon and settled in a manner satisfactory both to the Plaintiff, State of North Carolina, and to the aforementioned Defendants." Additionally, the terms were specific to the

effect that "the parties desire to resolve and settle all claims and matters in controversy in order to avoid the expense of protracted litigation." The federal rule regarding interpretation of consent decrees is found in United States v. Armour & Co., 402 U.S. 673, 681-82 (1971):

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation . . . . For these reasons, the scope of a consent decree must be discerned within its four corners.

Because the Court has concluded that Nash County was a party to the prior state action, it is bound by the terms of the decree. Any subsequent assertions to the contra by the Attorney General cannot be given effect to the extent that they contradict the plain language of the decree.

Nash County's second argument is similarly unpersuasive. It points to the North Carolina Supreme Court's decision in Town of

Bath v. Norman, 226 N.C. 502, 39 S.E.2d 363 (1946), in which the court vacated a consent judgment entered into by the town's private attorney without the express authorization from the town board. Nash County asserts that, because it never agreed to the consent decree entered into by the Attorney General, it cannot be held to the terms thereof. This argument must fail for, as the Court has previously pointed out, the Attorney General was the legitimate statutory and common law representative of all the local school boards. Because the Attorney General acted pursuant to this broad, unencumbered authority, he did not require explicit consent from the constituent school boards in order to bind them to the terms of the decree.

In sum, the Court finds that Nash County may not maintain this action further. To the extent that it is dissatisfied with the resolution of the state's action brought by the Attorney General, this result may seem harsh, nevertheless, it is the price this county must

pay as a creation and financial dependent of the state.

An appropriate order will issue.

S/Robert R. Merhige
United States District
Judge

Dated 11/27/78

FOOTNOTE

1. North Carolina law is not unequivocally clear on this issue. Neither side has cited, nor has the Court in its research found, any decision by the North Carolina Supreme Court idspositive of the issue. The Court notes, therefore, that this case probably would be suitable for certification to the North Carolina Supreme Court for an interpretation of the scope of the Attorney General's authority to represent local school boards. See Lehman Brothers v. Schein, 416 U.S. 386, 389-92 (1974). Unfortunately, North Carolina does not have such a certification procedure.

The Court also notes that, because this is not a diversity action, the res judicata issues are not dependent solely on North Carolina law. For reasons of comity as well as convenience, however, the Court has borrowed heavily from the state source of law.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1123

The Nash County Board of Education, Appellant,

-versus-

The Biltmore Company; Borden Inc.; Coble Dairy Products Cooperative, Inc,; Pet Inc,; Pine State Creamery Co,; Kraft, Inc. and Flav-o-rich, Inc.; for itself and as Successor in Interest of United Dairies, Inc., Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Robert R. Merhige, Jr., District Judge for the Eastern District of Virginia, sitting by designation.

Argued: March 4, 1980. Decided: January 12, 1981

Before RUSSELL AND HALL, Circuit Judges, and CHARLES H. HADEN, II, United States District Judge for the Northern District of West Virginia, sitting by designation.

J. Nat Hamrick (Hamrick & Hamrick; William L. Thorp, Thorp, Anderson & Slifkin; I. T. Valentine, Jr., Valentine, Adams and Lamar on brief) for Appellant; St. John Barrett (William S. Glading, John F. Sherlock, III, Barnett, Alagia & Carey; Jerry W. Amos, Brooks, Pierce, McLendon, Humphrey & Leonard on brief) for Flav-o-rich, Inc.;Fred D. Turnage (Cleary, Gottlieb,

Steen & Hamilton; Robert H. Dusenb, Wright T. Dixon, Jr., Bailey, Dixon, Wooten, McDonald & Fountain on brief) for Pet, Inc.; (George Ward Hendon, Adams, Hendon & Carson; Joseph R. Gladden, Jr., King & Spalding on brief) for Biltmore Company; (John W. Murchison, Jr., W. T. Covington, Jr., Kennedy, Covington, Lobdell & Hickman; Glenn S. Dennis on brief) for Borden, Inc.; (Joseph L. Leonard, Leonard & Snyder; J. Melville Broughton, Jr. Broughton, Wilkins, Ross & Crampton on brief) for Coble Dairy Products Cooperative, Inc.; (Henry A. Mitchell, Jr., Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan on brief) for Pine State Creamery Co.; (John R. Jordan, Jordan, Morris & Hoke; David L. Aufderstrasse, Chadwell, Kayser, Ruggles, McGee & Hastings; Theodore L. Banks on brief) for Kraft, Inc.; Jean A. Benoy, Deputy Attorney General (Rufus L. Edmisten, Attorney General of North Carolina on brief) for Amicus Curiae State of North Carolina.

RUSSELL, CIRCUIT JUDGE:

This is an appeal by the plaintiff-appellant The Nash County (N.C) Board of Education, from a grant of summary Judgment in favor of the defendants in an antitrust suit by the Plaintiff-appellant against nine dairy companies operating in North Carolina.[1] The basis of the district court's ruling was that, under the principles of res judicata, the plaintiff Board was precluded from maintaining the action by reason of a judgment entered in an earlier state antitrust action filed by the Attorney General of North Carolina against the same defendents as are defendants in this action.

The facts on appeal are not in dispute. Following a two year investigation, the Attorney General of North Carolina filed suit

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[1] Nash County Bd. of Ed. v. Biltmore Co., 464 F.Supp. 1027 (E.D.N.C. 1978)

in the Superior Court of Wake County, North Carolina, against the nine dairy companies, alleging certain state statutory authorizations for his representation of the claims. He identified the parties he asserted the right to represent as "each public school system in this state which received tax revenue directly or indirectly from the State of North Carolina for the conduct of educational training and programs, which purchases fluid milk to be resold, or given gratuitously, to members of the student body while in registered attendance at school." The complaint charged that the "defendants have, at various times since February, 1970, joined in agreements, combinations, and conspiracy in restraint of trade in the sale of milk products to the public school systems of North Carolina, which conspiracy and combinations have been in continuous operation since that time to the present date." It further alleged that such conspiracy had the effect that [p]rice

competition in the sale of fluid milk to the public school systems in North Carolina has been restrained and eliminated" and "[p]rices paid for fluid milk purchased by the public school systems in North Carolina have been at unreasonably high, artificial and non-competitive prices." This conspiracy was violative, according to the Attorney General's complaint, of the North Carolina antitrust laws, which, in the event of a violation, authorized the recovery of treble damages. N.C. Gen. Stat. ¶75-16 (1975). The prayer of the complaint sought both injunctive relief and treble damages. Though the complaint included a request for class certification, no class was ever certified and the case was settled with a consent decree entered by the presiding state judge and endorsed by all parties to the litigation.

Shortly after the consent judgment, the plaintiff Board instituted the present suit on October 23, 1975 in the United States district court. In its complaint, the plaintiff

identified the subject of its action as the purchase of "fluid milk, cottage cheese and ice cream from one or all of the defendants since February 1, 1970." It brought the action in its own name as one of the North Carolina school districts purchasing such products and sought to represent the class of all such school districts. It alleged the same conspiracy as had the Attorney General in his earlier state suit. The only differences between this action and the earlier action were (1) that this suit was based on the federal antitrust act and (2) the plaintiff in this later suit sought only treble damages but no injunctive relief. After discovery, the defendants in this later suit moved for summary judgment on the ground of res judicata. The district court granted the motion, ruling that the consent decree in the earlier suit barred the action brought by the Board. The Board has appealed, presenting as the sole issue whether the decree in the state action barred under the doctrine of res judicata

this federal suit. We affirm.

I

The doctrine of res judicata, which provides that "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action,"[2] is not a technical rule but a rule of "fundamental and substantial justice, 'of public policy and private peach,' which should be cordially regarded and enforced by the courts to the end that rights once established by the judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect."[3] It is more than a

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[2] Montana v. United States, 440 U. S. 147, 153 (1979). See also Parklane Hosiery Co. v. Shore, 439 U. S. 322, 326, n. 5 (1979); Brown v. Felsen, 422 U. S. 127, 131 (1979).

[3] Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917).

judicially created doctrine of repose; it is a rule mandated by the full faith and credit clause of the Constitution. Article 4 ¶ 1, and its implementing statute, 28 U.S.C. ¶ 1738,[4] and should be applied accordingly. As applied, the essential elements of the doctrine are generally stated to be (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits. We shall consider in that order these essential requisites for the application of the doctrine in this case.

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[4] American Surety Co. v. Baldwin, 287 U.S. 156, 166-6 (1932), Mitchell v. National Broadcasting Company., 553 F. 2d 265, 277 (2nd Cir. 1977); Developments in the Law- Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1334 (1977); Currie, Res Judicata: The Neglected Defense. 45 U.Chi.L.Rev. 317, 326

Professor Currie said:

"But federal respect for state court judgments is not, as is occasionally argued, a matter of judicial grace. It is the command of

(Continued on next page)

II

The plaintiff argues at the outset that a consent decree of judgment such as that entered by the North Carolina court in the earlier action will not support the requirement of a final judgment under either res judicata or collateral estoppel. The district court found otherwise and we agree. As Judge Soper said in Rector v. Suncrest Lumber Co., 52 F.2d 946, 948 (4th Cir. 1931), a consent judgment "is as conclusive and final as to any matter determined as one rendered in invitum after contest and trial (citing authorities]. And such a judgment cannot be

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4 (Continued)

Congress in section 1738 of Title 28: 'The... judicial proceedings of any court of any ... State, Territory, or Possession ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.' 'Every court within the United States,' as one would expect, has been construed to include federal courts."

impeached collaterally in another proceeding." To the same effect are Safe Flight Instrument Corp. v. United Control Corp., 576 F.2d 1340, 1344 (9th Cir. 1978); Wallace Clark & Co., Inc. v. Acheson Industries, Inc., 532 F.2d 846, 849 (2d Cir.), cert. denied, 425 U.S. 976, reh. denied, 427 U.S. 908 (1976); Seigel v. National Periodical Publishers, Inc., 508 F. 2d 909, 913 (2d Cir. 1974) ("... a consent judgment does have res judicata effect ...'); Belvit Culligan Soft Water Service, Inc. v. Culligan, Inc., 274 F.2d 29, 35 (7th Cir. 1959); Urbino v. Puerto Rico Ry. Light & Power Co., 164 F.2d 12, 15 (1st Cir. 1947); Steyer v. Westvaco Corp., 450 F.Supp. 384, 397 (D.Md. 1978); William v. Codd, 459 F.Supp. 804, 811-12 (S.D.N.Y. 1978); Vulcan, Inc. v. Fordees Corp., 450 F.Supp. 36, 41-42 (N.D.Ohio 1978); Hemphill v. Hemphill, 398 F.Supp. 1134, 1136-37 (N.D.Ga. 1975); Brunswick Corporation v. Chrysler Corporation, 287 F.Supp. 776, 777 (E.D.Wis. 1968); United States v. Radio Corporation of America,

46 F.Supp. 654, 655m (D.Del. 1942), appeal dis., 318 U.S. 796 (antitrust consent decree).[5] Of course, as Judge Maris pointed out in Radio Corporation, supra, consent decrees "may be set aside for lack of actual consent to the decrees, as entered, for fraud in their procurement, or for lack of federal jurisdiction." 46 F Supp. at 656 It was because of a "lack of

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[5] In United States v. Radio Corporation, 46 F. Supp. at 655, Judge Maris put it:

"A consent decree, although based upon an agreement of the parties rather than a finding of facts by the court, is not a mere authentication or recording of that agreement. It is a judicial act (United States v. Swift & Co., 286 US 106, 115, 52 S.Ct. 460, 76 L.Ed. 999) and, therefore, involves a determination by the chancellor that it is equitable and in the public interest."

We have assumed that this issue of the res judicata effect of a consent judgment in this context would be a matter of federal law. There is authority that, in diversity actions, the issue is one controlled by local state law, see Graves v. Associated Transport, Inc., 344 F. 2d 894, 896 (4th Cir. 1965), but this would not alter the result here, since North Carolina law gives res judicata affect to consent judgments. Simpson v. Plyler, 258 N.C. 390, 397, 128 S.E. 2d 843, 848 (1963); McRory v. McRory, 228 N.C. 714, 719, 47 S.E. 2d 27, 31 (1948).

actual consent" by the party of interest that the consent decree was invalidated in West v. Bank of Commerce & Trusts, 167 F.2d 664 (4th Cir. 1948). There is, however, no contention in this case that the judgment was procured by fraud or with lack of "consent" by the Attorney General, who was the party plaintiff in the state action. We have accordingly no difficulty in concluding, as did the district court, that the consent judgment in the state court constituted for res judicata purposes, a final judgment on the merits.[6]

III.

The second requirement for res judicata is identity of causes of action. Unfortunately,

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[6] See, also, Annotation: Consent Judgment as Res Judicata, 97 L.Ed. 1188 at 1191-92 (1953):

"As a general proposition, it is well settled that a valid judgment or decree entered by agreement or consent operates as res judicata to the same extent as a judgment or decree entered after answer and contest, and is binding and conclusive upon the parties, and those in privity with them."

the authorities do not provide any precise uniform definition of "cause of action" in connection with the application of res judicata. A "much broader" definition of "cause of action" in connection with the doctrine of res judicata has developed under modern authorities, Williamson v. Columbia Gas & Electric Corp., 186 F 2d 464, 469 (3d Cir. 1950), cert. denied, 341 U.S. 921 (1951). Under this modern rule, the term, "cause of action," has been given varied application, depending largely on the facts in each case. Thus, in some cases, it has depended for its application on whether the facts in the two cases are the same;[7] in other cases, on whether

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[7]This was the test employed in The Haytian Republic, 154 U.S. 118, 125 (1894), (* * * whether the evidence necessary to prove one cause of action would establish the other"), and accords with the one expressed in Williamson v. Columbia Gas & Electric Corp., supra. 186 F. 2d at 469-70, which held there was identity when the same operative facts were present even though there were different theories of recovery.

See, also, McNellis v. First Federal Savings & Loan Assn., 364 F. 2d 251, 255 (2d Cir. 1966).

the same primary right is asserted.[8] See Note, Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations, 53 Va. L. Rev. 1360, 1361 (1967); 1b Moore's Federal Practice, § 0.410[1] at 1154 (3d ed. 1974). But, irrespective of which test is applied and however broad or narrow the definition, it is manifest that there is identity of causes of action between the action begun by the Attorney General in the state court and that instituted by the plaintiff in the federal court. Both suits deal with the same subject-matter, i.e., the purchase of fluid milk and milk products solely by the various school districts of North Carolina. They involve no other purchases. The two suits allege the same

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[8]The authorities supporting this view are illustrated by Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927); see also, Norman Tobacco & Candy Col v. Gillette Safety Razor Co., 295 F.2d 362, 363 (5th Cir. 1961), (* * * the same alleged breach of duty").

wrongful act, the same illegal price-fixing conspiracy, the same operative facts in support of such conspiracy. The state and federal statutes upon which the two actions are based are indentical in language except in the requirement of the federal statute, but not of the state statute, of a showing of interstate commerce. In both cases, the evidence will be identical and the damages recoverable and the relief available the same.

Under established precedent, the identity of two actions, as intimately tied together as these two, will not be destroyed in the res judicata context simply because the two suits are based on different statutes. This was clearly held in Williamson, supra, where one suit was under the Clayton Act and the other under the Sherman Act. Nor will the rule be any different because a state statute is the authority for one action and a federal statute for the other, when the two statutes afford the same right or interdict the same wrong, Mitchell

v. National Broadcasting Co., 553 F.2d 265 (2d Circ. 1977).[9] In the cited case, a final state court judgment under a state civil rights statute was held to be res judicata of a later federal court action under § 1981, 42 U.S.C., involving the same parties. 553 F.2d at 266-8. This is equally so when the state action is one at common law and the later federal action is under a federal statute or statutes (§ 1983 and § 1985). This was expressly ruled in Davis v. Towe, 379 F.Supp. 536, 538 (E.D. Va. 1974), aff'd. without opinion, 526 F. 2d 588

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[9] Note, State Agencies, State Courts, Res Judicata, and Section 1981: Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977), 10 Conn. L.Rev. 967 (1978); Note, Employment Discrimination-State Judicial Procedure Forecloses Federal Remedy Under 42 U.S.C. §1981: Mitchell v. NBC, 31 Rutgers L.Rev. 973 (1979).

While these commentators look with a somewhat jaundiced eye on this and recent related decisions from the same circuit, they recognize that the decision is expressive of a more liberal attitude toward a plea of res judicata and collateral estoppel, prompted as it is by the multiplication of repetitive actions in state and federal courts and by an understandable desire on the part of the courts to checkmate a growing practice of forum shopping.

(1975). It has, also, been held that the same rule will apply even though the subsequent federal action is one over which federal courts have exclusive jurisdiction, provided, again of course, the state and federal actions involve the same "operative facts" and the same basic "delict" or wrong. Williamson v. Columbia Gas & Electric Co., 186 F.2d at 467; Connelly v. Balkwill, 174 F.Supp. 49, 60 (N.D. Ohio 1959), aff'd., 279 F.2d 685 (1960);[10] Kaufman v. Shoenberg, 154 F.Supp. 64, 67-8 (D. Del. 1954). Both Connelly and Kaufman involved state actions in fraud which were urged as res judicata against a federal action charging the same fraud as violative of the

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[10]This decision is discussed and its result approved by Professor Moore in 1B, Moore's Federal Practice, § .410[2], n.38 at 1182-3 (1974 ed.). See Note, The Effect of Prior Nonfederal Proceedings on Exclusive Federal Jurisdiction Over Section 10(b) of the Securities Exchange Act of 1934, 46 NYU L.Rev. 936, 944-5 (1971).

Securities and Exchange Act, which gave exclusive jurisdiction to federal courts over any action thereunder. In both cases, the plea of res judicata was upheld. In Williamson it was held that an antitrust judgment barred on res judicata grounds a later conspiracy suit. These cases merely illustrate what was said in Astron Industrial Associates, Inc., v. Chrysler Motors Corp., 405 F. 2d 958, 961 (5th Cir. 1968) that, " i n regard to the identity of the two lawsuits, it is the substance of the actions that must be compared and not their form." And this rule has been applied where the earlier state action was under a state antitrust statute and the latter under the federal antitrust act, which is this case.

The earliest case to confront the problem whether a prior state action under a state antitrust statute barred under the doctrine of res judicata a later federal antitrust suit was Straus v. American Publishers' Assn., 201 F. 306, 310, (2d Cir. 1912), appeal dis. 235 U.S. 716. In sustaining the bar, the Court in that case said:

> "The fact that the judgment in the state court depended upon the state statute, which is not within the jurisdiction of the state court, makes no difference The plaintiffs,

having the option to go to either court, chose the state court and their claim, having been there adjudicated, cannot be presented the second time to any other court." [11]

In Englehardt v. Bell & Howell Co., 327 F 2d 30 (8th Cir. 1964), the situation was identical with that presented by the facts

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[11] The Sherman Act itself does not prescribe exclusive federal jurisdiction but exclusive jurisdiction has been read into the Act by judicial decisions. See Note, Exclusive Jurisdiction of the Federal Courts in Private Civil Actions, 70 Harv.L Rev 509, 510 & n 13 (1957):

"The legislative history of the Sherman Act indicates that exclusive jurisdiction was not intended Although Congress felt that treble damages constituted a penalty and, as such, were unenforceable in the state courts, it was apparently intended that the injured parties should be allowed to sue in those courts for compensatory damages (citing the legislative references.) The conception that the state courts could not constitutionally award treble damages seems to have been erroneous even at the time the Sherman Act was passed, see Claflin v. Houseman, 93 U.S. 130, 137 (1976) (dictum) and clearly is not the law today in view of Testa v. Katt, 330 U.S. 386 (1947) * * * "

of this case The plaintiff had filed a prior action in the state court under the state antitrust statute. The case was voluntarily dismissed by the plaintiff, after its removal to the federal court for diversity. That dismissal was held to bar the later federal action under the Sherman Act on principles of res judicata. The only difference between Englehardt and this case is the removal of the state action to the federal court This difference is, however, unimportant; the important fact is that the action dismissed was the action on the state statute, not the federal statute, and it was that dismissal which barred the maintenance of the subsequent federal Sherman Act action. In short, the Court held expressly that the action on the state statute was the same as the action under the Sherman Act and that a voluntary dismissal of that earlier action on the state statute constituted a bar to the maintenace of the later Sherman Act action on the same facts.

In Woods Exploration & Producing Co., Inc. v. Aluminum Company of America, 438 F. 2d 1286 (5th Cir. 1971), cert. denied 404 U. S. 1047, the Court considered two suits, one under the Texas antitrust statute and the other under the federal antitrust statute. It followed Englehardt and held that the two actions constituted merely "alternative

grounds of recovery for the same causes of action" and that "the principle of res judicata enforceable by injunction, would thus preclude relitigation in the state court following this federal judgment if the state and federal courts involve substantially the same wrongs measured by similar standards of liability so that recovery in the federal suit will have compensated plaintiffs for the total harm suffered." Id. at 1314-15. The court found that the two suits asserted "the same wrong," albeit on like statutes of two separate jurisdictions, and granted injunctive relief on the grounds of res judicata against the further maintenance of the state suit as to those parts of the federal judgment which were not reversed.

It is true that there are federal antitrust cases which have denied res judicata effect to judgments entered in state actions under a state antitrust suit where the state statute did not authorize recovery of treble damages. The rationale of these cases was well stated by the Court in Hayes v. Solomon, 597 F.2d 959, 984 (5th Cir. 1979).

> "The principle of res judicata which prohibits splitting a cause of action applies only to claims 'then capable of recovery' in the first action (citing an authority.)
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> In this case, the first forum, the Texas state court, could not provide the relief sought in the second

forum, federal antitrust damages i.e., treble damages . We hold, therefore, that this case was not barred by the splitting prohibition."

To the same effect is Cream Top Creamery v. Dean Milk Co., 383 F.2d 358, 363 (6th Cir. 1967.)

In this suit, however, under the state statute, modeled as it is after the federal statute and offering the same right to recover treble damages as the federal statute, there is not the ground for denying res judicata effect to the state court judgment stated in Hayes and Cream Top for denying res judicata effect in this case to the earlier state court judgment. The plaintiff, though, contends that Lyons v. Westinghouse Electric Corp., 222 F.2d 184 (2d Cir.) reh. denied, 222 F.2d 195, cert. denied, 350 U.S. 825 (1955) which overruled Straus, supra, is conclusive against res judicata application in this case.

It should be noted at the outset that Lyons did not involve a plea of res judicata proper but of collateral estoppel. It is, however, proper to assume that the same rule generally would apply with reference to both pleas since collateral estoppal is generally regarded as merely a "branch" or "other prong" of res judicata. The issue in Lyons grew out of a motion to stay a federal action under the Sherman Act because of a judgment on appeal in

a state action between the same parties. The state action had been a suit on a consignment contract account. In that action the defendant had asserted by way of a defense the invalidity of the consignment contract on antitrust grounds. The state court, in its judgment, found against the antitrust plea and awarded judgment to Westinghouse. Lyons, the defendant in the state action, then filed his antitrust action in the federal court. Westinghouse sought a stay of the federal action pending disposition of the appeal of the state judgment. The district court granted the stay but, on appeal, the Circuit Court vacated the stay, concluding that the state court judgment would not bar on collateral estoppel grounds the federal suit. In reaching that conclusion, the court conceded that, absent antitrust exclusivity, collateral estoppel would apply to "the whole nexus of facts" constituting the antitrust causes of action, thereby "ending the jurisdiction of the district court." 222 F.2d at 188 and 189. Thus, it said that "the grant to the district courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere; at least on occasions, like those at bar, where the punitive estoppel includes the whole nexus of facts

that make up a wrong. The remedy provided is not solely civil; two thirds of the recovery is not remedial and inevitably presupposes a punitive purpose." 222 F.2d at 189.

Lyons, however, "has received a mixed response from legal commentators (citing authorities), and a number of courts have refused to follow it," New York State Teamsters Pension & Retirement Fund v. Pension Benefit Guaranty Corp., 591 F.2d 953, 956-7 (D.C. Cir. 1979); in fact, the author of Developments in the Law--Section 1983 and Federalism, 90 Harv.L.Rev. 1133, 1135, n. 20, states that "most later decisions have not followed the Lyons result, see, e.g. Azalea Drive-in Theatre, Inc. v. Hanft, 540 F.2d 713 (4th Cir. 1976) * * *."[12] This unfavorable response can only be taken as

[12]To the same effect is the Note, Collateral Estoppel of State Court Judgment in Federal Antitrust Suits, 51 Cal. L.Rev. 955, 964 (1963), where the author states that "for patent cases, Rule 10b cases, . . . both of which are within exclusive federal jurisdiction and arguably, for limitation of liability proceedings (were it not for the stipulation exacted from the state court claimant), the prior findings of state courts will be conclusive in subsequent federal proceedings, notwithstanding the grant of exclusive subject matter jurisdiction" to the federal court in such cases.

an expression of dissatisfaction with the reasoning behind the decision in Lyons. We look now to that reasoning.

The reasoning of the Court in Lyons rests on two grounds. The first was the exclusivity of the federal remedy under the Sherman Act; the second was the unavailability in the state action of the treble damage recovery, which the Court regarded as a "crucial" and essential part of the federal right of action. In developing his first reason arising out of the exclusivity of the federal remedy, Judge Hand in Lyons seemed to concede that collateral estoppel based on a single fact determination in the state action, if not decisive of the whole issue of federal antitrust violation, was a permissible plea in a later federal antitrust suit between the same parties. But if the plea of collateral estoppel in such a case extended to what Judge Hand called "the whole nexus of facts that make up the wrong" (i.e., the antitrust violation), its recognition would operate in similar fashion to strict res judicata and operate to "end the jurisdiction of the district court" thus frustrating the exclusivity of federal jurisdiction. It was this latter situation that Judge Hand in Lyons found

invalid.[13]

Unquestionably, there is a certain logic in Judge Hand's reasoning. When the plea of collateral estoppel based on a prior state action between the parties embraces all the constituent elements of the federal antitrust claim, its acceptance does in effect defeat any exclusive right in the federal court to decide independently the federal antitrust action. The result is in reality no different than had a plea of res judicata been accepted in its effect on the principle of federal exclusivity. But, contrary to Judge Hand's opinion in Lyons, later decisions, as well as decisions prior to Lyons including one from the United States Supreme Court which Judge Hand unsuccessfully sought to distinguish,[14] have not found the result objectionable. Thus, as the author of the Note in 53 Va.L.Rev., supra, at 1369 said that, "In several cases following Lyons

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[13] The Court sought to distinguish Becher v. Contoure Laboratories, Inc., 279 U.S. 388 (1929), by declaring erroneously that the collateral estoppel upheld in that case applied only to "one of the constituent facts that together made up the claim," not to "the whole nexus of facts."

[14] Actually, the Supreme Court in Becher v. Contoure Laboratories, Inc., 279 U.S. at 388, had already done exactly that Judge

(Continued on next page.)

federal courts, considering the effect of a state-court judgment on a later claim within exclusive jurisdiction of the federal courts, have largely ignored the importance that Judge Hand attached to the maintenance of unfettered exclusive federal jurisdiction." And the Court in New York State Teamsters, supra, at 957 made the same point, observing in that connection that our own case of Azalea was one of the cases which had not followed Lyons on this point. For a recent example of a like application of collateral estoppel, see,

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14 (Continued)

Hand had found invalid in Lyons. It held that issues involving patent law, over which federal courts have express exclusive jurisdiction, as decided in a prior state action between the parties should receive finality through collateral estoppel, even though the effect was to foreclose federal determination of exclusive federal claims. 279 U.S. at 390-2. Judge Hand recognized the applicability of Becher and sought to distinguish it but, as the writer in the Note, Developments-Section 1983, 90 Harv.L.Rev. 1133 at 1135, n. 20, puts it, "it is questionable whether Judge Hand distinguished Becher v. Contoure Laboratories, 279 U.S. 388 (1929), where the Supreme Court held that a state court judgment that a patent holder held a patent as a constructive trust for another precluded a federal suit for patent infringement within the exclusive federal jurisdiction, 28 U.S.C. 1338 (1970)."

McNally v. Esmark, 427 F. Supp. 1211, at 1218-22 (N.D. Ill. 1977).[15] If the second federal action, which is within exclusive federal jurisdiction, can thus be barred by collateral estoppel based on a decision in a prior state action, without violating the rule of exclusivity of federal jurisdiction, there can be no logical reason for not holding that such action can be barred by res judicata where there is identity of causes of action between the parties, and this is exactly what the court did in Straus, Englehardt and Woods, supra.

Judge Hand's second reason is more persuasive; and it seems to have been the main thrust of his opinion. It is the same reason as that stated and applied by the Court in

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[15] In this case, which was under the Securities Act where there is an express provision for federal exclusivity of remedy as distinguished from a judicially created exclusivity as under the Sherman Act, the Court refused to apply res judicata but applies collateral estoppel in the very way Judge Hand in Lyons said the Court, in recognition of the exclusivity of federal jurisdiction, could not do: It dismissed the federal antitrust action as barred by collateral estoppel, which worked the same result as a plea of res judicata.

For a discussion of McNally, see Einhorn & Gray, The Preclusive Effect of State Court Determinations in Federal Actions under the Securities & Exchange Act of 1934, 3 Journal of Corp. Law 235 (1978).

Hayes and Cream Top, supra. In Lyons, the remedy in the state court was found to be different from that available in the federal court because only in the federal court could a recovery of treble damages be had. Assuming that res judicata requires that the same right of recovery be available in both suits, this would be a second reason for Judge Hand's conclusion. But this point is unimportant here and raises no bar to the application of res judicata in this case, for the North Carolina statute again is identical in the plaintiff's right of recovery under the Sherman Act, if successful: It can secure treble damages on the same terms under both statutes.

There is another ground raised in Lyons but dismissed by Judge Hand for giving collateral estoppel effect to the state court action in this case. It would, if upheld, be equally a ground for granting res judicata effect to a state judgment in a prior identical state suit, if the ground is deemed sound. The rationale for this ground begins with the fact that the plaintiff in Lyons had been the defendant in the state contract suit. Had he filed the state action as plaintiff, the situation would be different, even though Judge Hand in Lyons, by way of a dictum thought differently, because, as Professor Moore, in his comment on

Connelly, referred to in note 10, supra, has argued, the plaintiff, by choosing to file the state action on the same cause of action, had voluntarily waived the benefits, if any, of a federal forum and both res judicata and collateral estoppel should be available to bar a subsequent federal action on that same cause of action, even though the federal action was within the exclusive jurisdiction of a federal court. This result--at least, so far as collateral estoppel is concerned--was approved by the author of the Note in 53 Va. L. Rev., cited supra, at 1383:

> "When this choice-of-forum is present, it is difficult to justify providing immunity from estoppel effect on the ground that a litigant has the privilege to litigate under federal procedure--he has, in effect, waived any such privilege by choosing a state court for the first suit."

Indeed, the good sense of this conclusion is so great that the writer of the Note, The Collateral Estoppel Effect of Prior State Court Findings in Cases within Exclusive Federal Jurisdiction, 91 Harv.L.Rev. 1281, 1290, who is sympathetic to the Lyons view and who is critical of our decision in Azalea Drive-In Theatre, concedes:

> "In certain cases, the equities between the parties are so one-sided that the application of traditional collateral estoppel rules is warranted. Such a case arises when a losing state

> plaintiff, who originally had a choice of bringing suit in either state or federal court, subsequently brings a federal claim based on the same transaction as the earlier state suit."

Certainly, this case fits the equities which support the waiver doctrine as presented by Professor Moore. The plaintiff in the state case was the privy of the plaintiff in this later federal suit.[16] The right to recover for an alleged conspiracy to fix prices of fluid milk sold to North Carolina school districts and paid for with funds, in whole or in part, advanced the school districts by the State of North Carolina was first submitted to the North Carolina courts by the plaintiff's privy under a state statute which was for all practical purposes in this connection an exact duplicate of the federal statute. Having brought the suit originally in the state court through its privy, the plaintiff cannot, after judgment in the state court, seek another "bite at the cherry" by filing a like action in federal court. It has, as Professor Moore suggests, voluntarily waived its right to maintain the second suit and res judicata and collateral estoppel should be and are available to bar this second suit, when the

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[16] For the discussion on the status of the two plaintiffs in the state and federal actions, see Section IV, set forth later.

second suit is, as here, identical with the earlier action.

We accordingly condlude, as did the able district judge, that there was sufficient identity of causes of action between the state and federal actions to support a finding of res judicata based on the judgment in the earlier state action.

IV.

We now turn to the final requirement for res judicata, i.e., identity of parties, a requirement mandated both at common law and by due process, It may be accepted that under this requirement the doctrine of res judicata binds only parties or their privies by a prior judgment. In this case, there is no contention that the plaintiff was a party to the earlier suit begun in the name of the State of North Carolina by its Attorney General, which ended with a consent judgment. The defendants did claim, though, that the plaintiff in this suit was in privity with the plaintiff in that earlier action by the Attorney General and thus is bound by the consent judgment therein. This conclusion, the defendants assert, complies with the common law requirement and satisfies the demands of due process. The district judge sustained the defendants in this position. The plaintiff contests that conclusion of the district judge. The resolution of

this contention of the plaintiff turns substantially on the meaning of the term "privity" as applied in the res judicata context.

Privity is a term without any "generally prevailing definition * * * which can be automatically applied to all cases involving the doctrine of res judicata," Heaton v. Southern Ry. Co. 119 F. Supp. 650, 660 (W.D.S.C. 1954). It has been appropriately described as "an elusive concept, without any precise definition of general applicability * * * [which in essence] designates [for res judicata purposes] a person so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved," Jefferson School of Social Science v. Subversive Act. Com. Bd., 331 F. 2d 76, 83 (D.C. Cir. 1963). Or, as the Court similarly declared in Aerojet General Corp. v. Askew, 511 F. 2d 710, 719, (5th Cir. 1975), cert. denied 423 U.S. 908,[17] the term

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[17] See, also, to the same effect: Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1233 (2d Cir.), cert. denied, 434 U.S. 903 (1977); Alderman v. Chrysler Corp., 480 F. Supp. 600, 607 (E.D. Va. 1979); Hann v. Carson, 462 F. Supp. 854, 861 (M.D. Fla. 1978); and Currie, supra, at 333-4.

In Expert Electric, the Court said at 1233:

(Continued on next page.)

is sufficiently inclusive "[under the federal law of res judicata [that] a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned

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17 (continued)

"The threshold requirement of identity of parties, qualified by the doctrine of privity, finds its roots in the ancient notion, now supplemented by the due process clause, that a person cannot be bound by a judgment without notice of a claim and an opportunity to be heard. Whether such identity is evident is a factual determination of substance, not mere form. Astron Industrial Associates, Inc. v. Chrysler Motor Corp., 405 F. 2d 958, 961 (5th Cir. 1968); Aerojet General Corp. v. Askew, 511 F. 2d 710, 719 (5th Cir.), cert. denied, 423 U.S. 908, 96 S. Ct. 210, 46 L.ED. 2d 137 (1975). Generally speaking, one whose interests were adequately represented by another vested with the authority of representation is bound by the judgment, although not formally a party to the litigation. Aerojet General Corp. v. Askew, supra at 719; Roode v. Michaelian, 373 F. Supp. 53, 55 (S.D.N.Y. 1974). While often justified by the doctrine of privity, the theory underlying this general proposition is that the party bound is in substance the one whose interests were at stake in the prior litigation. Therefore, we need first examine, in order to determine whether there was an identity of parties between the state and federal court actions, the degree of representative authority vested in the sponsor JAC to administer the terms of the program."

with his interests as to be his virtual representative.]" Perhaps, however, the most apt definition of "privity" in this connection was that phrased by Judge Goodrich in his concurring opinion in Bruszewski v. United States, 181 F. 2d 419 at 423 (3d Cir.) cert. denied, 340 U.S. 865 (1950):

> "Privity states no reason for including or excluding one from the estoppel of a judgment. It is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata."

Applying this definition, we have no difficulty in finding the appellant School District in privity with the Attorney General, in instituting the earlier state court proceeding.

The Attorney General in filing his state action, the judgment in which constituted the basis for the District Court's finding of res judicata, declared himself the legal representative, entitled to commence and maintain such suit on behalf of "each public school system in this state which received tax revenue directly or indirectly from the State of North Carolina . . . [for the purchase of] fluid milk to be resold, or given gratuitously, to members of the student body while in registered attendance at such school." The plaintiff in this action was concededly such a school district. The authority of the Attorney General

to sue as the representative of the school districts of the State, including the plaintiff School District, seems clear both at common law and under the relevant statutory law of North Carolina. At common law, an attorney general, in the absence of some restriction on his powers by statute or constitution, has complete authority as the representative of the State or any of its political subdivisions "to recover damages [whether under state or federal law] alleged to have been sustained by any such agency or political subdivisions," even though those subdivisions may not have "affirmatively authorized suit." For an excellent discussion of this common law authority of the office of attorney general, see State of Florida ex rel. Shevin v. Exxon Corp., 526 F. 2d 266, 270 (5th Cir. 1976), cert. denied, 429 U.S. 829 (antitrust suit instituted by the State Attorney General on behalf of State and various political subdivisions); State of Illinois v. Bristol-Myers Corp., 470 F. 2d 1276 (D.C. Cir. 1972) (antitrust suit on behalf of "all political subdivisions" of State); Wade v. Mississippi Cooperative Extension Serv., 392 F. Supp. 229 (N.D. Miss. 1975); State of Illinois v. Associated Milk Producers, Inc., 35 F. Supp. 436 (N.D. Ill. 1972) (antitrust suit on behalf, among others, school districts, in purchases of fluid milk).

There is no North Carolina statutory or constitutional provision limiting the authority of the North Carolina Attorney General. In fact, the thrust of the North Carolina statutory law is to the contrary. Thus, those statutes expressly authorize the Attorney General of that State to "represent all State departments, agencies . . . or other organized activities . . . of the State which receive support in whole or in part from the State." G.S. Sec. 114-2 (2). (Italics added) It was this statute on which the Attorney General, in his state action, based his authority to sue on behalf of the various school districts of the State, which had "received tax revenues directly or indirectly from the State of North Carolina for . . . purchases [of] fluid milk to be resold, or given gratuitously, to members of the student body while in registered attendance at such school." The State action was specifically limited in scope to purchases of "fluid milk" by the school districts with funds supplied "in whole or in part" by the State. It sought treble damages for no other transactions. Those were transactions in which both the State and the school districts such as the plaintiff in this suit were involved financially, in which both had suffered damages if there was an antitrust violation. The state action was unquestionably one the Attorney General, both under his common law

authority and under his express authority, had the right to maintain and it was one in which the interests asserted by the Attorney General were identical with those stated by the appellant School District in this federal action.

In that state antitrust suit the Attorney General sought to recover on behalf of the plaintiff and the other school districts of the State overpayments for dairy products occasioned by the appellees' alleged price fixing and market control mechanizations. These are precisely the interests and the right to recover over-payments which the appellant now asserts in the case at bar. The money used to pay for the dairy products in question came, in part at least, from the coffers of state government and the state itself had a direct stake in the litigation.[18] These and

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[18]The case at bar should be distinguished from other antitrust suits brought by the state as parens patriae. Here state funds are involved and the State of North Carolina, through its Attorney General, is the real party in interest. This action would be subject to close scrutiny if it were of the parens patriae genre. See, for example, Oklahoma v. A.T. & Santa Fe Ry., 220 U.S. 277 (1911); Kansas v. United States, 204 U.S. 331 (1907); Louisiana v. Texas, 176 U.S. 1 (1900); N.H. v. Louisiana: N.Y. v. Louisiana, 108 U.S. 76 (1883). See also Malina & Blechman, Parens Patriae Suits for Treble Damages Under the Antitrust Act, 65 Nw. U.L. Rev. 193 (1970).

these only are the stakes and the interests which the Attorney General sought to represent, i.e., the recovery of past over-payments and equitable protection against future price control schemes by the appellees. We cannot imagine a factual setting more clearly demonstrative of the requisite unity in interest in both suits. The interests of the State in the state action, and the plaintiff School District in the federal action are identical, not merely contextually related.

The appellant suggests that even if the Attorney General possesses the authority to represent state agencies, this authorization is superseded by the North Carolina statutes[19] which empower local school boards to sue and be sued in their own behalf.[20] The statutes

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[19] N.C.Gen. Stat. Sections 115-27 and 115-31.

[20] This same argument was advanced, and summarily rejected in Wade v. Mississippi Cooperative Extension Serv., 392 F. Supp. at 234, where the Court stated:

> "The Board's final, and most serious, contention is that Sec. 213-A of Mississippi's Constitution, inserted in 1944, created the Board as an autonomous agency entrusted with the management and control of Mississippi's senior colleges and universities, and thus invested the Board with the power to employ legal

(Continued on next page.)

relied upon do create a unique right in the school boards, but these statutes do not contradict the Attorney General's right to represent such school districts. When North Carolina General Statutes, Secs. 115-27 and 115-31, which are the statutes on which the appellant relies for this contention, were enacted in 1955 the legislature intended to create a new remedy but it is not to preclude one already in wziarwnce. It would seem self-evident that common sense dictatec that when an alleged wrong affects governmental units on a state-

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20 (Continued)

counsel in all cases to which it is a party, independently of the Attorney General. . . . Since Sec. 213-A nowhere expressly grants to the Board authority to engage counsel for the purpose of conducting litigation of state-wide interest, the Board's assertion that Sec. 213-A bestows such authority can only be based upon a claim that Sec. 213-A impliedly effects a pro tanto repeal of the plenary authority conferred on the Attorney General by Sec. 173 to represent the State in all litigation of such character. . . . It is easily perceptible that even if the foregoing statute purports to give the Board authority to retain private legal counsel as professional advisors, no statutory enactment can override the well-established constitutional authority of the Attorney General in this area of strong State concern."

wide basis, the state should seek redress on their behalf as well as on its own rather than parcelling out the actions among local agencies.[21] However, to ease the administrative burden on the Attorney General's office, when a single local school board is wronged, that unit should individually pursue the remedy it deems appropriate. This is the scheme, we believe, that the North Carolina Legislature had in mind when it adopted Secs. 115-27 and 115-31. It necessarily follows that these statutes were not intended to infringe upon the then-existent powers vested in the Attorney General.

The appellant's next line of attack relates to the Attorney General's failure to give notice to the Board of the state antitrust

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[21] When the claim advanced is statewide in scope and involves geographically diverse agencies of state government, courts have found the Attorney General to be the best representative to bring the action. State of Illinois v. Associated Milk Producers, Inc., 351 F. Supp. 436; State of Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969); State of Illinois v. Brunswick Corporation, 32 FRD 453 (N.D. Ill. 1963); Wade v. Mississippi Cooperative Extension Serv., 392 F. Supp. 229.

action[22] and in the failure to consult with the Board prior to settlement. While the appellant relies heavily on these omissions, they are of no moment in the instant case. The Attorney General as legal representative of the sovereign and its constitutional subdivisions had both common law and statutory power to bind the State and the subdivisions by his acts. Moreover, it goes without saying that the Attorney General is not limited in his authority to settle or compromise claims by a requirement of consultation with those agencies which might be tangentially affected by a proposed settlement. Here the claims involved both the State and numerous school districts. To impose a requirement that the Attorney General to whom authority was granted expressly by

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[22]This is a somewhat disingenuous argument. The School District knew the Attorney General was investigating, with a view to litigation, the purchases of milk by the school districts. He had sent investigators to this School District and these investigators had reviewed those records. The School District thus knew that the Attorney General contemplated filing his action. Later the Attorney General gave wide publicity to the institution of his action. It imposes too much credibility to suggest that the School District was ignorant of the Attorney General's action.

statute, must consult with and obtain the consent of every school district before he may exercise his statutory authority would not only be a voiding of the Attorney General's statutory authority but, in addition, would be the creation of a cumbersome system leading to almost ludicrous results. By engrafting this restriction upon the Attorney General's authority, the State's legal representative, in attempting to exercise his statutory authority, would be buffeted from hither to yon according to the whims of various local agency directors. Clearly the Attorney General's failure to consult with the Board prior to settlement in no way denigrates the legal significance of the consent decree.

The appellant School District, in addition, argues that the Attorney General never intended or sought to represent the individual School Districts in his action. To support this argument, it emphasizes that in his complaint the Attorney General prayed for class certification and that, if the Attorney General intended his representation to include the rights of the School Districts he would not have prayed for class certification, a prayer which incidentally was never pressed or granted. The difficulty with this argument is that it is completely contradictory of the Attorney General's own allegation of his

representation. In the beginning paragraphs of his complaint, the Attorney General clearly identified the parties he was representing. These parties were, as we have already noted, "each public school system in the State. ..." In the face of this asserted right of representation by the Attorney General of all the State's School Districts, including the appellant School District, it was superfluous to certify the school districts as a class, if the Attorney General had a right in propria persona to represent the school districts. The Attorney General, as we have seen, had that right both at common law and by statute. It follows that, whether there was class certification or not, the requirement of unity of parties or their privies existed in the two actions under the circumstances involved here.

CONCLUSION

In summary, the District Court was correct in finding that the action by the appellant School District was barred by the doctrine of res judicata. The judgment of the District Court is accordingly

AFFIRMED.

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CIVIL NO.

THE STATE OF NORTH CAROLINA, ex. rel. JAMES H. CARSON, JR., ATTORNEY GENERAL, Plaintiff, v. BILTOMRE DAIRY FARMS, INC.; BORDEN, INC.; COBLE DAIRY PRODUCTS COOPERATIVE, INC.; DAIRYMEN, INC.; MAOLA MILK AND ICE CREAM COMPANY; PET, INC.; PINE STATE CREAMERY COMPANY; KRAFTCO CORPORATION; AND UNITED DAIRIES, INC. Defendants.	COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES Jury Demanded

The Plaintiff, complaining of the defendants, alleges:

A. PARTIES

1. The plaintiff is the State of North Carolina, and brings this action on the relation of James H. Carson, Jr., the Attorney General of North Carolina pursuant to the duty and authority of the Attorney General as set

forth in N.C. Gen Stat. §§74-14, 75-15 and 75-16.

2. (a) The defendants are identified and described as follows:

Name of Corporation	State of Incorporation	Principal Place of Business
Biltmore Dairy Farms, Inc.	North Carolina	Biltmore, N.C.
Borden, Inc.	New Jersey	New York, N.Y.
Coble Dairy Products Cooperative, Inc.	North Carolina	Lexington, N.C.
Dairymen, Inc.	Kentucky	Louisville, KY
Maola Milk and Ice Cream Company	North Carolina	New Bern, N.C.
Pet., Inc.	Delaware	Dover, Delaware
Pine State Creamery Company	North Carolina	Raleigh, N.C.
Kraftco Corporation	Delaware	Wilmington, Delaware
United Dairies, Inc.	North Carolina	Greensboro, N.C.

(b) Each of the foregoing defendants conducts and transacts business within the State in the line of products described below

throught its officers, agents and employees, each of whom at all times mentioned in this Complaint were acting in the course and scope of their employment.

B. JURISDICTION AND VENUE

3. This is a civil antitrust action seeking permanent injunctive relief as provided for in G.S. §75-14 and money damages as provided for in G.S. §75-16, against each of the defendants, jointly and severally, as named in paragraph 2 above.

C. CLASS ACTION REQUESTED

4. (a) This action is brought on plaintiff's own behalf as a direct purchaser of fluid milk from the defendants and as one of the sources of revenue used to pay part of the purchase price of fluid milk by the various public school systems of North Carolina; and as the class representative of a class of "persons" described below, which have purchased fluid milk from the defendants, as is authorized by Rule 23(a), N.C. Rules of Civil Procedure.

(b) The class of persons which have purchased fluid milk from the defendants, which plaintiff seeks to represent in this action, in addition to itself, are described as follows: each public school system in this state which received tax revenue directly or indirectly from the State of North Carolina for the conduct of educational training and programs, which purchases fluid milk to be resold, or given gratuitously, to members of the student body while in registered attendance at such school. There are at least one hundred forty-nine (149) such public school systems in North Carolina.

(c) The persons constituting the class described above are so numerous as to make it impracticable to bring them all before the court and the plaintiff will fairly insure the adequate representation of all.

D. STATUTORY PROVISIONS INVOLVED

5. Chapter 75 of the North Carolina General Statutes prohibit as illegal:

a. Every contract, combination in

the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina. . . [G.S. 75-11];

b. While engaged in . . . selling any goods in this State, to have any agreement or understanding, express or implied, with any other person not to . . . sell such goods within certain territorial limits within the State, with the intention of preventing competition in selling . . . such goods within these limits. [G.S. §75-5(b)(6)];

c. . . . [A]ny contract, obligation or agreement of any kind by which the parties thereto or any two or more of them bind themselves not to sell or dispose of any goods . . . below a common standard figure or fixed value, or establish or settle the price of such goods between them, or between themselves and other, at a fixed or graduated figure, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale of such goods. [G.S. §75-5 (b)(7)]; and

d. [All] [u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . [G.S. §75-1.1].

6. Conscious adherence to a commonly understood and agreed upon scheme, whether such agreement is express or tacit: (a) to sell goods at a common standard figure or fixed value; or (b) to establish or settle the price of such

goods at a fixed or a graduated figure so as to directly or indirectly preclude a free and unrestricted competition among themselves in the sale of goods is an unfair method of competition and an unfair act or practice within the meaning of G.S. §75-1.1.

E. THE PRODUCT AND GEOGRAPHIC MARKET

7. The products involved in this action are fluid milk, ice cream and cheese sold to public school systems within the State of North Carolina.

F. BACKGROUND TO VIOLATIONS ALLEGED

8. Prior to and during the year 1970, the North Carolina Milk Commission (hereafter "the Commission") had promulgated and issued Fair Trade orders (hereinafter "FTO") which required milk processors doing business in North Carolina to file with the Milk Commission the processors' home market prices for fluid milk products. Additionally the processor was required to advise his competitors of his filed prices. The FTO prohibited the processor from selling fluid milk at prices other than the

filed price without first giving the Milk Commission and all of his competitors ten days advance notice of change of price. Any of the processors' competitors could then change their price to meet the processor's changed price without advance notice.

9. The Milk Commission's Fair Trade Order applied to processors' sales to the public school systems throughout North Carolina until 1970. During 1970, the Milk Commission rescinded those provisions of its Fair Trade Order which required prior notice be given to the Commission and competitors on sales to public school systems.

G. THE VIOLATIONS ALLEGED

10. Upon information and belief, on or about February, 1970, in a meeting room at Biltmore Dairy Plant in Asheville, North Carolina at which representatives of the defendants were present, a representative of one of the defendants announced in a clear and audible voice that notwithstanding the change of the Commission's regulations as they related to

sales to public school systems, he was satisfied with methods then in use under the FTO's by which milk was sold to the school systems. He further announced he was going to continue his practice in the future and invited the other processors' representatives present to do the same. All of those present audibly expressed their agreement with the practice.

11. Upon information and belief, since that time processors have called competitors by telephone, discussed and agreed to prices to be bid to public school systems.

12. Upon information and belief, defendants have, at various times since February, 1970, joined in agreements, combinations, and conspiracy in restraint of trade in the sale of milk products to the public school systems of North Carolina, which conspiracy and combinations have been in continous operation since that time to present date.

13. Upon information and belief, in furtherance of the agreements, combinations, and conspiracy in restraint of trade as set

forth above, defendants at various times continuously since February, 1970, either have submitted identical bids or limited service bids to public school systems in North Carolina.

14. Upon information and belief, various other milk processors, individuals, and milk distributors, not made defendants herein, participated as conspirators in the violations alleged above and performed acts in furtherance thereof.

15. Upon information and belief, for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they combined and conspired to do.

H. EFFECTS

16. Upon information and belief, the aforesaid combinations and conspiracy have had the following effects among others:

(a) Price competition in the sale of fluid milk to the public school systems in North Carolina has been restrained and eliminated;

(b) Prices paid for fluid milk purchased by the public school systems in North Carolina have been at unreasonably high, artificial and non-competitive prices;

I. PRAYER

1. Wherefore, Plaintiff prays:

(a) This action be tried before a jury.

(b) This action be determined a class action within Rule 23 of the N.C. Rules of Civ. Procedure.

(c) That the court adjudge and decree that the defendants, and each of them, have engaged in an unlawful combination and conspiracy in unreasonable restraint of trade in violation of Chapter 75 of the North Carolina General Statutes.

(d) That each of the defendants, their successors, assignees, and transferees, and the officers, directors, agents, and employees thereof, and all other persons acting or claiming to act on behalf thereof, be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the aforesaid violation and from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of having a similar purpose or effect.

(e) That plaintiff, and the class it represents, recover of the defendants treble damages for the injuries suffered by Plaintiff and the class it represents, as provided for by G.S. §75-16.

(f) That the plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

(g) That the plaintiff recover the cost of this action.

This the 21st day of October.

JAMES H. CARSON, JR.
Attorney General

/s/ Jean A. Benoy
Deputy Attorney General
NC Department of Justice
P. O. Box 629
Raleigh, North Carolina
27602

JURY DEMANDED

Plaintiff hereby demands trial by jury pursuant to Rule 38 of the North Carolina Rules of Civil Procedure.

/s/ Jean A. Benoy

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE SUPERIOR COURT DIVISION CIVIL NO.

THE STATE OF NORTH CAROLINA, ex. rel. RUFUS L. EDMISTEN, Attorney General,

Plaintiff,

vs.

THE BILTMORE COMPANY; BORDEN INC.; COBLE DAIRY PRODUCTS COOPERATIVE, INC.; MAOLA MILK AND ICE CREAM COMPANY; PET, INCORPORATED; PINE STATE CREAMERY COMPANY; KRAFTCO CORPORATION; and FLAV-O-RICH, INC., for itself and as successor in interest of United Dairies, Inc.,

Defendants.

CONSENT JUDGMENT

This matter coming on to be heard and being heard before the undersigned Judge presiding over the General Court of Justice, Superior Court Division of the Tenth Judicial District; and

IT APPEARING to the Court from statements made by counsel for the Defendants named in the caption above and counsel for the Plaintiff that all matters in controversy arising out of this action have been agreed upon and settled in a manner satisfactory both to the Plaintiff, State of North Carolina, and to the aforementioned Defendants, and that the parties hereto desire to consent to the entry of this judgment without the said consent judgment constituting evidence of, or being construed as, an admission by either party with respect to any issue of fact or law; and

IT FUTHER APPEARING to the Court that:

1. The State of North Carolina instituted this action pursuant to the provisions of G.S. 75-14, 75-15, and 75-16 and alleged violations of G.S. 75-1, 75-1.1, and 75-5.

2. The Defendants deny that they have jointly or otherwise engaged in any acts constituting a violation of G.S. 75-1, 75-1.1, 75-5, or any other law or laws in their dealings with the State or public school

systems, districts, or Boards of Education of the State of North Carolina.

3. Upon the express understanding that Defendants deny that they have jointly or individually violated the laws of the State of North Carolina, and before the taking of any testimony and without trial or adjudication of any issue of fact or law, the parties desire to resolve and settle all claims and matters in controversy in order to avoid the expense of protracted litigation.

NOW THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendants, their officers, directors, agents, and employees shall not in any manner, directly or indirectly, with each other or with any competitor, put into effect, be a party to any agreement, or engage in any combination, conspiracy, contract, agreement,

understanding, or concert of action having the purpose of restraining or eliminating competition in the price of fluid milk, ice cream, and cottage cheese sold to the public school systems of North Carolina whether by bid or otherwise.

2. Defendants shall, independently of each other or any competitor, determine all fluid milk, ice creas and cottage cheese prices to be charged to any public school system within the State of North Carolina. Each Defendant, upon responding to an invitation for competitive bids, shall concurrently forward by mail a copy of the bid submitted to any public school system to the Attorney General, provided, however, that the Attorney General shall be prohibited from opening any such bids until after the date specified by the school system for bid opening, if shown on the envelope containing said bid. In the event of negotiated sales, at the termination of negotiations with a public school system, the negotiated price shall be forwarded to

the Attorney General.

3. All copies of bids or negotiated prices shall be accompanied by a certification that such bid or negotiated price was arrived at independently, without any combination, conspiracy, contract, agreement, understanding, or concert of action with any stated Defendant or any other competitor.

4. Within 30 days after receipt of bids or negotiated prices, upon written request by the Attorney General, each Defendant agrees to supply the Attorney General a written statement setting forth how such bid or price was arrived at by such Defendant. Any information furnished to the Attorney General thereunder shall be considered confidential and not revealed except to the Court in aid of the enforcement of this judgment or any other proceeding instituted by the Attorney General to enforce the antitrust laws of the State of North Carolina.

5. Each Defendant shall file with the Attorney General within 30 days and on each

anniversary date of this judgment during the term hereof, a report setting forth the steps which it has taken to advise its officers, employees, and agents who are directly involved in the sale of fluid milk, ice cream, and cottage cheese to the public school systems in North Carolina, of their obligations under the terms of this judgment and shall certify through an authorized agent that it has not, to the knowledge of such person, violated the terms of this judgment.

6. The term "public school systems" as used in this judgment shall mean any school or schools within any Board of Education as defined in G.S. 115-27.

7. The provisions of this judgment shall not prohibit any Defendant from complying with any law administered by or regulations promulgated by the North Carolina Milk Commission, and shall not prohibit any Defendant from entering into agreements with its distributors or subdistributors as to any prices paid to such Defendant by such distributors or subdis-

tributors, and such distributors and subdistributors who are independent contractors shall not be considered agents of the Defendant for any purpose of this judgment. Further, the provisions of this judgment shall not prevent any agricultural cooperative association from exercising the rights conferred upon it by 7 USC Sections 291, 292 and 455 and by N.C.G.S. Sections 54-132, 54-141, and 54-156; provided, that nothing in the foregoing statutes shall be construed to authorize any Defendant cooperative association to fix or agree with a competitor on the price of fluid milk, ice cream, and cottage cheese to be bid to any public school in North Carolina as defined in this judgment.

8. In the event the Attorney General or the Defendants cannot agree to the meaning of the terms herein, or are of the opinion that the terms have been or are being violated, they shall first communicate with the other party and by conference, after notice, attempt to resolve the differences between themselves.

In the event such conference or conferences are of no avail, either the Attorney General or the Defendants may apply to the Court by motion in the cause after due notice given, and jurisdiction is retained by this Court for the purpose of enabling the parties to this judgment to apply to this Court for a construction of this judgment or for such further order and direction as may be necessary to carry out this judgment, or for the enforcement of compliance therewith, and for the punishment of the violation of any of the provisions contained herein in the discretion of the Court.

9. This judgment and any and all reporting provisions herein shall terminate and cease to be effective three (3) years from the date of the entry of this judgment.

This the 12th day of May, 1975.

/S/ C. E. Brewer

Judge Presiding

CONSENTED TO:

STATE OF NORTH CAROLINA, ex rel.

RUFUS L. EDMISTEN, Attorney General

By: /S/ Ruful L. Edmisten

FLAV-O-RICH, INC.

JORDAN, WRIGHT, NICHOLS, CAFFREY

& HILL, Attorneys

BROOKS, PIERCE, McLENDON, HUMPHREY

& LEONARD, Attorneys

By: /S/Welch Jordan

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
Civil No. 75-1876

THE NASH COUNTY BOARD OF EDUCATION,	)	
Plaintiff,	)	
vs.	)	AMENDED
THE BILTMORE COMPANY; BORDEN, INC.; COBLE DAIRY PRODUCTS COOPERATIVE, INC.; DAIRYMEN, INC.; MAOLA MILK AND ICE CREAM COMPANY; PET INCORPORATED; PINE STATE CREAMERY COMPANY; KRAFTCO CORPORATION; and FLAV-O-RICH, INC., For Itself and as Successor to Interest of United Dairies, Inc.,	)	COMPLAINT
Defendants	)	

Plaintiff complaining of defendants says:

DESCRIPTION OF PLAINTIFF AND CLASS

1.

(a) The plaintiff, the Nash County Board of Education, is a body politic created by the Legislature of the State of North Carolina and authorized and dir-

ected to administer the public schools of Nash County, North Carolina. Pursuant to the administration of such schools, plaintiff is charged with the duty and authority to purchase fluid milk, ice cream and cottage cheese for the public schools of Nash County.

(b) Plaintiff brings this action as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of itself and all other County and City Boards of Education as described in Chapter 115 of the General Statutes of North Carolina located in the State of North Carolina.

(c) The plaintiff is representative of the class described in Chapter 115 of the General Statutes of North Carolina located in the State of North Carolina, who have purchased fluid milk, cottage cheese and ice cream from one or all of the defendants since February 1, 1970.

(d) With respect to the class referred to, the class is so numerous that joinder of

all members is impractical. There are questions of law or fact common to the entire class. The claim of the plaintiff is typical of the claims of the class and the plaintiff will fairly and adequately protect interest of the entire class. Questions of law or fact common to the members of class predominate over individual questions and a class action is superior to all other available methods for adjudication of this controversy.

JURISDICTION

This court has jurisdiction of the parties and subject to this action under the provisions of 15 U.S.C., Sections 1, 2, 13, 13(a), 15 and 22 and also under the provisions of 28 U.S.C., Section 1337 and plaintiff brings this action under the provisions of those statutes.

DESCRIPTION OF DEFENDANTS AND CO-DEFENDANTS

3.

(a) The defendants are identified and

described as follows:

Name of Corporation	State of Incorporation	Principal Place of Business and Registered Agent In South Carolina
The Biltmore Company	Delaware	Biltmore, N. C. C. T. Corporations Systems 409 East North St. Greenville, S. C.
Borden, Inc.	New Jersey	New York, New York Prentice Hall Corp. Inc. Palmetto State Life Bldg. 1310 Lady Street Columbia, S. C.
Coble Dairy Products Cooperative, Inc.	North Carolina	Lexington, N. C. Ted T. Ridge 1606 West Palmetto Street, Florence, S. C.
Dairymen, Inc.	Kentucky	Louisville, Kentucky Venable Vermont 158 W. Main St. Spartanburg, S.C.
Maola Milk and Ice Cream Company	North Carolina	New Bern, N. C. Registered Agent: None
Pet Incorporated	Delaware	Dover, Delaware C. T. Corporations Systems 409 East North

		Street Greenville, S. C.
Flav-O-Rich and its Predecessor, United Dairies, Inc.	North Carolina	Greensboro, N.C. Registered Agent: None

(b) Each of the foregoing defendants conducts and transacts business within the State of North Carolina in the sale and distribution of milk, cottage cheese and ice cream as described below through its officers, agents and employees, each of whom at all times mentioned in this complaint were acting in the course and scope of their employment.

COMBINATION TO RESTRAIN TRADE AND MONOPOLIZE

4.

Beginning not later than February 1, 1970, and continuing up to the date of the filing of this complaint, defendants and co-conspirators and other persons acting

for each of them have jointly and severally engaged in:

(a) A continuing combination and conspiracy to restrain interstate and foreign commerce of the United States in fluid milk, cottage cheese and ice cream in violation of Section 1 of the Sherman Act.

(b) A combination and conspiracy to monopolize and a combination and conspiracy to attempt to monopolize interstate and foreign commerce of the United States in fluid milk, cottage cheese and ice cream in violation of Section 2 of the Sherman Act; and

(c) An attempt to monopolize and pursuant thereto have in fact achieved monopoly of interstate and foreign commerce of the United States in fluid milk, cottage cheese and ice cream in violation of Section 2 of the Sherman Act.

The substantial terms of the restraints, monopolization and attempts and conspiracies to monopolize have been that defendants and co-conspirators jointly and severally agreed inter alia and carried out such agreements:

(a) By agreement, understanding and joint conduct eliminated all competition between themselves which was based upon or resulted from geographical location.

(b) By agreement, understanding and joint conduct have fixed, manipulated and affected the price of fluid milk, cottage cheese and ice cream. Defendants have carried out such agreement by various methods including meeting together and communicating with each other in person, by telephone and by other means, by adopting uniform prices for their milk according to a scheme which effectuated an allocation of markets among the various defendants

and effectively eliminated competition between defendants in regard to the sale of fluid milk, cottage cheese and ice cream to plaintiff and each member of this class.

(c) By agreement, understanding and joint conduct have exchanged trade information and adopted other similar methods of doing business all with the purpose of stabilizing the price of milk sold to the plaintiff and all members of the class at non-competitive levels effectively eliminating competition and maintaining prices substantially higher than would have been charged in a competitive market.

INJURY TO PLAINTIFF AND MEMBERS OF THE CLASS

6.

(a) The effect of the combination alleged above has been that plaintiff and members of the class have been denied the benefits of a free market price for fluid milk, cottage cheese and ice cream and

have been required to pay a higher price for said products than they would have paid if the defendants had not combined and acted to supress competition as alleged.

(b) Each of the methods alleged herein as having been utilized to violate the anti-trust laws has contributed to the artificially higher prices which plaintiff and members of the class have been required to pay as aforesaid.

(c) During the period from February 1, 1970, until the institution of this action, plaintiff and the members of the class have purchased milk, cottage cheese and ice cream from defendants and the co-conspirators in the sum of approximately $100,000,000. The injuries to plaintiff and each member of the class described above have caused said plaintiff and members of the class to suffer monetary damage in an amount not now susceptible

to precise measurement or estimate but which will be substantially determined and supplied by amendment to this complaint or otherwise as the court shall direct.

FRAUDULENT CONCEALMENT

7.

(a) Neither plaintiff nor any member of the class knew or with due diligence could have known of the existence of the combination in restraint of trade and combination to monopolize and only learned of the nature and full extent of the combination a short time before the filing of this complaint. Defendants acting jointly and as a part of the aforesaid combination in restraint of trade and to monopolize concealed the combination and its nature, terms and methods by secret meetings and other communications between themselves which were not disclosed to the public or to purchasers or to any government agency or to anyone from whom plaintiff or any

member of the class could have acquired knowledge concerning the combination.

(b) The nature, terms and methods used by the defendants were of a type which were self-concealing and were not and could not have been apparent to plaintiff or any member of the class in the regular course of the business relationships between them and defendants.

(c) Defendants as to the above allegations specifically and fraudulently represented to plaintiff and members of the class that the prices of milk, cottage cheese and ice cream were established in accordance with law.

Plaintiff and all members of the class demand trial by jury pursuant to Rule 38(b) of the Federal Rules of Civil Procedure.

WHEREFORE, plaintiff demands:

(a) That the alleged combination and conspiracy among the defendants, the

conspiracy and attempt to monopolize and monopolization be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Act.

(b) That judgment be entered against defendants and in favor of plaintiff and each member of the class represented by plaintiff for treble the damages determined to have been sustained by them together with the costs of suit including reasonable attorneys' fees.

(c) Such other and further relief as may appear necessary and appropriate to the court.

This the 23rd day of October, 1975.

Respectfully submitted,

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(page 146) "[H]e said we are only settling the State's claims in settling, in settling this judgment. We are not concerned with any local government units, county or school boards."

(page 147) "Wright Dixon. And then we, just, when the Attorney General said, are you going to sign the judgment Benoy, I said no, it is prepared for your signature and he said, well, let's see it. And he said, well, now at that point in signing this we are not settling any claims except the state's, and, and in substance, Mr. Dixon said that, that was the chance that they were taking."

(page 35) "On that occasion, did Mr. Estimen say in substance in the presence of any of the counsel for the defendants that he was settling only the state claims, not those of the school boards?"

A "Yes, he did. He said that at the

signing of the judgment."

(page 115) "I told him as I understood the methodology that is used for establishing a class, you have to move the court to establish a class. You have to give notice to the class. And that involves, as I understand the class action of the rule and the case law, that would require a notice to them of any intended settlement."

Q "A notice to whom?"

A "To the members of the class."

§ 75-1. Combinations in restraint of trade illegal.

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned, or both, in the discretion of the court, whether such person entered into such contract individually or as an agent representing a corporation, and such corporation shall be fined in the discretion of the court not less than one thousand dollars ($1,000).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the

newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

§ 75-5. Particular acts prohibited.

(a) As used in this section:

(1) "Person" includes any person, partnership, association or corporation;

(2) "Goods" include goods, wares, merchandise, articles or other things of value.

(b) In addition to the other acts declared unlawful by this Chapter, it is unlawful for any person directly or indirectly to do, or to have any contract express or knowingly implied to do, any of the following acts:

(1) To agree or conspire with any other person to put down or keep down the price of any goods produced in this State by the labor of others which goods the person intends, plans or desires to buy.

(2) To sell any goods in this State upon condition that the purchaser thereof shall not deal in the goods of a competitor or rival in the business of the person making such sales.

(3) To willfully destroy or injure, or undertake to destroy or injure, the business of any competitor or business rival in this State with the purpose of attempting to fix the price of any goods when the competition is removed.

(4) While engaged in buying or selling any goods within the State, through himself or together with or through any allied, subsidiary or dependent person, to injure or destroy or undertake to injure or destroy

the business of any rival or competitor, by unreasonably raising the price of any goods bought or by unreasonably lowering the price of any goods sold with the purpose of increasing the profit on the business when such rival or competitor is driven out of business, or his business is injured.

(5) While engaged in dealing in goods within this State, at a place where there is competition, to sell such goods at a price lower than is charged by such person for the same thing at another place, when there is not good and sufficient reason on account of transportation or the expense of doing business for charging less at the one place than at the other, or to give away such goods, with a view to injuring the business of another.

(6) While engaged in buying or selling any goods in this State, to have any agreement or understanding, express or implied, with any other person not to buy or sell such

goods within certain territorial limits within the State, with the intention of preventing competition in selling or to fix the price or prevent competition in buying such goods within these limits.

(7) Except as may be otherwise provided by Article 10 of Chapter 66, entitled "Fair Trade," while engaged in buying or selling any goods in this State to make, enter into, execute or carry out any contract, obligation or agreement of any kind by which the parties thereto or any two or more of them bind themselves not to sell or dispose of any goods or any article of trade, use or consumption, below a common standard figure, or fixed value, or establish or settle the price of such goods between them, or between themselves and others, at a fixed or graduated figure, so as directly -or indirectly to preclude a free and unrestricted competition among themselves, or

any purchasers or consumers in the sale of such goods.

(c) Nothing herein shall be construed to make it illegal for an agent to represent more than one principal, but this provision shall not be deemed to authorize two or more principals to employ a common agent for the purpose of suppressing competition or preventing the lowering of prices.

(d) This section does not make it illegal for a person to sell his business and good-will to a competitor, and agree in writing not to enter business in competition with the purchaser in a limited territory if such agreement does not violate the principles of the common law against trusts and does not otherwise violate the provisions of this Chapter.

§ 75-14. Action to obtain mandatory order.

If it shall become necessary to do so, the Attorney General may prosecute civil actions in the name of the State on relation of the Attorney General to obtain a mandatory order, including (but not limited to) permanent or temporary injunctions and temporary restraining orders, to carry out the provisions of this Chapter, and the venue shall be in any county as selected by the Attorney General.

§ 75-15. Actions prosecuted by Attorney General.

It shall be the duty of the Attorney General, upon his ascertaining that the laws have been violated by any trust or public service corporation, so as to render it liable to prosecution in a civil action, to prosecute such action in the name of the State, or any officer or department thereof, as provided by law, or in the name of the

State on relation of the Attorney General, and to prosecute all officers or agents or employees of such corporations, whenever in his opinion the interests of the public require it.

§ 75-16. Civil action by person injured; treble damages.

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be iloegal: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or

hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on

conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonmnet not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemd guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 15. Suits by persons injured; amount of recovery.

Any person who shall be injured in his

business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

AMENDMENTS

Amendment V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia , when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall

be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 23. Class actions.

(a) Representation. --If persons constituting a class are so numerous as to make it impractable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

(b) Secondary action by shareholders.- In an action brought to enforce a secondary right on the part of one or more shareholders or members of a corporation or an unincorporated association because the corporation or association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath.

(c) Dismissal or compromise.--A class action shall not be dismissed or compromised without the approval of the judge. In an action under this rule,

notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs.

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No. 80-1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE NASH COUNTY BOARD OF EDUCATION, *Petitioner,*

v.

THE BILTMORE COMPANY, ET AL., *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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JOINT BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court and the court of appeals properly held that an earlier judgment of a North Carolina court barred this action under the following circumstances:

1. The earlier action was filed in state court by the state attorney general for the State and all of its local school boards alleging violation of state antitrust law in the sale of milk to the local school boards and seeking to recover treble damages and obtain injunctive relief for all such boards.

2. The state law affords all relief and procedural protections afforded by federal law.

3. Pursuant to state law, the attorney general represented the local school boards in the state action.

4. The state attorney general entered into a final consent judgment with all defendants in the state action disposing of "all matters in controversy" in that action.

5. Five months after the consent judgment, one of the local school boards filed this action on behalf of all such boards seeking treble damages from the same defendants on the identical claim.

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JOINT BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet.App. 41-84) is reported at 640 F.2d 484. The opinion of the district court (Pet.App. 2-40) is reported at 464 F. Supp. 1027.

JURISDICTION

The judgment of the court of appeals was entered January 12, 1981, and a petition for rehearing denied February 19, 1981. The petition for a writ of certiorari was filed on May 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Petitioner Nash County Board of Education ("Nash County"), suing on behalf of itself and "all other County and City Boards of Education . . . in the State of North Carolina", filed this action in the district court on October 23, 1975 seeking treble damages for alleged violations of sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2). Pet.App. 105-117.

The complaint alleges that the respondents, each a dairy company engaged in marketing milk and milk products to public schools in North Carolina, had conspired since February 1, 1970 to restrain and monopolize commerce in such products. This is alleged to have injured the school boards by denying them the benefits of a free market price. Pet.App. 112-113.

Each respondent filed a motion for summary judgment, asserting that an earlier state court judgment bars the present proceeding under the doctrine of res judicata. The district court granted the motions and entered final judgment for the respondents. Pet.App. 1. The Court of Appeals for the Fourth Circuit unanimously affirmed (Pet.App. 41-84), and denied Nash County's petition for rehearing (Pet.5).

The state court action upon which the earlier judgment was entered was filed by the attorney general of North Carolina in the name of the State on October 21,

1974. Pet.App. 85-95. The complaint recited that the State brought the action "as one of the sources of revenue used to pay part of the purchase price of fluid milk by the various public school systems of North Carolina," as well as on its own behalf as a purchaser of fluid milk and as a representative of a class consisting of all public school systems in the state. Pet.App. 87-88. The complaint prayed for both an injunction and treble damages. Pet.App. 94. All of the alleged misconduct, as well as the relief sought, related solely to the sale of milk to the local school boards, of which petitioner was one. Pet.App. 90-93.

On May 12, 1975 the state court entered a consent judgment in the state action reciting that "all matters in controversy arising out of this action have been agreed upon and settled in a manner satisfactory both to the Plaintiff, State of North Carolina, and the aforementioned defendants." Pet.App. 97. The judgement further recited that "the parties desire to resolve and settle all claims and matters in controversy in order to avoid the expense of protracted litigation." Pet.App. 98. In line with the settlement of the parties, the judgment provided detailed injunctive relief (Pet.App. 98-103), but allowed no money damages. It provided that the state court retain jurisdiction "for the purpose of enabling the parties to this judgment to apply to this Court for a construction of this judgment and for such further order and direction as may be necessary to carry out this judgment, or for the enforcement of compliance therewith, and for the punishment of the violation of any of the provisions contained herein in the discretion of the Court." Pet.App. 103. By its terms, the judgment was to cease being effective three years from its entry, i.e., May 12, 1978. *Id.*

Five months after entry of the state decree, petitioner filed the present federal district court complaint, again seeking treble damage from the same dairy company respondents with respect to the identical conduct complained of in the state court action.

REASONS FOR DENYING THE WRIT

The concurrent findings of the district court and of the court of appeals are manifestly correct and fully support application of the doctrine of res judicata. Indeed, the need for applying res judicata is confirmed here by its dual purpose, i.e., to protect litigants from the burden of relitigating the same cause of action with the same parties or their privies and to promote judicial economy by preventing needless litigation. *Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322, 326 (1979); *Montana* v. *United States*, 440 U.S. 147, 153-54 (1979). Moreover, the comprehensive and well reasoned opinion of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Review by this Court is accordingly not warranted.

In asserting that the doctrine of res judicata was misapplied by both lower courts, the petitioner does not now contend that the earlier state court judgment lacked finality, that it was anything other than a judgment on the merits, or that the earlier action sought relief for anything less than all injury and wrongs for which relief is sought in the second proceeding. Rather, petitioner asserts that it was never a party to nor in "privity" with any party to the first proceeding; that it could not have been such a party absent certification of the class in the first proceeding under state law; and that to now bar a second suit would deprive it of its right to prosecute its federal claim, deny it class action procedures guaranteed

by state law, and deprive it of property without due process of law.

As petitioner acknowledges, the question of whether it was represented in the state court proceeding and should therefore be bound by the judgment turns on a number of considerations. Principal among these are: (1) the authority of the attorney general of the State of North Carolina to represent the school boards of North Carolina in court; (2) whether the attorney general represented the North Carolina school boards, including the petitioner, in the state court proceeding; (3) the proper construction of the state court complaint in terms of parties represented, claims being asserted and relief sought, and (4) the proper construction of the final judgment in the state court proceeding. Although petitioner quarrels with the manner in which the courts below handled each of these issues, none of them require review by this Court. Petitioner has had the opportunity to argue fully its views concerning North Carolina law, the proper construction of the attorney general's complaint in the state proceeding, and the proper construction to be given the state court judgment. Its views were carefully considered by both courts below and were rejected. Their rulings, largely factual, involve no conflict with the rulings of the courts of appeal for the other circuits and should be accepted by this Court without review. See *Berenyi* v. *District Director, Immigration & Naturalization Service,* 385 U.S. 630, 635 (1967), and *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1948). To the extent their rulings turned on interpretation of North Carolina law, they are entitled to similar deference. *Estate of Spiegel* v. *Commissioner,* 335 U.S. 701, 707-08 (1949), *Propper* v. *Clark,* 337 U.S. 472, 486-87 (1949).

Petitioner erroneously states that the suit by the attorney general "stated two causes of action." Pet.6. Actually, it stated a single cause of action brought by the attorney general in the name of the State, but stated three legal bases for the standing of the State and of the attorney general to sue. First, the attorney general recited that "this action is brought on plaintiff's own behalf as a direct purchaser of fluid milk from the defendants."[1] Pet.App. 87. Second, the attorney general recited that the action was brought by the State "as one of the sources of revenue used to pay part of the purchase price of fluid milk by the various public school systems of North Carolina."[2] *Id.* Third, the attorney general recited that the State sued as a representative of a class consisting of all school boards in the state. Pet.App. 87-88. Thus, it is clear, as found by both of the courts below, that the representation of the school boards by the attorney general was not dependent upon the class action aspect of the State's suit.

The petitioner urges four specific reasons why this Court should grant review. Pet.16-26. Contrary to petitioner's assertion, none of them is grounds for certiorari.

1. *Constitutional Claims.* Petitioner's constitutional claims assume that it was not represented by the State of North Carolina and its attorney general in the state court proceeding. This assumption is unfounded because, as the state complaint made clear and the lower courts

---

[1] The allegations of the complaint, however, concern *only* purchases actually made by the local school boards.

[2] This recital relates to North Carolina General Statutes, §114-2 which provides that the Attorney General shall "represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State *which recieve support in whole or in part from the State.*" Pet.App. 24 (emphasis added).

found, the attorney general in fact represented the local school boards in the first proceeding. In any event, framing its assertion in constitutional terms adds nothing to petitioner's legal argument that res judicata has been misapplied because of non-identity of the parties to the two proceedings.

2. *Exclusively Federal Claim.* Petitioner argues that the decisions below conflict with the decision of the Court of Appeals for the Second Circuit in *Lyons* v. *Westinghouse Elec. Corp.*, 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955), and with the decision of the Court of Appeals for the Sixth Circuit in *Cream Top Creamery* v. *Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967). There is, however, no conflict. The courts below carefully and properly distinguished both *Lyons* and *Cream Top* from the case at hand. Neither of the other two circuits had before it the question of the res judicata effect of a prior state court judgment under a state law that provided the full relief available under federal law, including treble damages for an antitrust violation.

3. *Absence of Class Certification.* Petitioner argues that the decisions below conflict with *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir.), *reh. denied*, 581 F.2d 267 (1978), *cert. denied*, 439 U.S. 1115 (1979). But there is nothing in *Pettway* inconsistent with the decisions here. Apart from the fact that *Pettway* construes and applies Rule 23 of the Rules of Federal Civil Procedure while the only class action procedures relevant to this petition are those under North Carolina law, the courts below have not ruled upon the adequacy or inadequacy of the North Carolina procedures or their application by the North Carolina court in handling the class action aspect of the state claim. Both the courts below and the parties agree that the

North Carolina court neither intended to follow nor did follow the class action route in disposing of the state case. The courts below have simply held, upon a record that permits no other holding, that the local school boards were, through the representation of the state attorney general, parties in interest to the state court proceeding, wholly apart from any considerations of class action representation. The Court of Appeals for the Fifth Circuit has itself recently held in a class action that a state attorney general's "authority and responsiblity as representative of the state's political subdivisions does not derive from Rule 23" and that the attorney general accordingly need not comply with Rule 23 procedures in order to bind the subdivisions. *In re Armored Car Antitrust Litigation*, No. 79-3301 (5th Cir. May 21, 1981), 1981-1 CCH Trade Cases 76,298, at 76,302, ¶ 64025. Indeed, the court of appeals there, in concluding that an attorney general has authority to bring an antitrust action on behalf of subdivisions of the state without first obtaining their explicit authorization, cited the court of appeals opinion here. *Id.* at 76,301, n.5. Thus, there is clearly no conflict between the decisions here and those of the Fifth Circuit.

4. *Public Policy.* In urging that the decision below "is against the public policy of the United States and against the facts of this case", petitioner states no additional grounds for certiorari.

The petitioner's argument for certiorari reduces in large measure to a quarrel over words. The district court, in describing the complete identity of interest between the attorney general in the state court proceeding and Nash County in the federal proceeding, referred to them as the "same party." Pet.App. 28. The court of appeals, on the other hand, refers to them as being in

"privity." Pet.App. 72-75. Indeed, it went so far as to state that "there is no contention that the plaintiff was a party to the earlier suit begun in the name of the State of North Carolina by its Attorney General." Pet.App. 72. It is clear, however, that the court of appeals means merely that Nash County was not a *named* party in the state court. It reaches the same conclusion as the district court, for the same reasons as the district court, that the attorney general's action was intended to, and did, enforce the direct legal interest of all local school boards, including Nash County. This was plainly stated by the court of appeals as follows:

> In that state antitrust suit the Attorney General sought to recover on behalf of the plaintiff and the other school districts of the State overpayments for dairy products occasioned by the appellees' alleged price fixing and market control mechanizations. These are precisely the interests and the right to recover over-payments which the appellant now asserts in the case at bar. The money used to pay for the dairy products in question came, in part at least, from the coffers of state government and the state itself had a direct stake in the litigation.[18] These and these only are the stakes and the interests which the Attorney General sought to represent, *i.e.*, the recovery of past over-payments and equitable protection against future price control schemes by the appellees. We cannot imagine a factual setting more clearly demonstrative of the requisite unity in interest in both suits. The interests of the State in the state action, and the plaintiff School District in the federal action are identical, not merely contextually related.

Pet.App. 78-79 (footnote ommitted).

Although the above holding is the same as that of the district court, petitioner seizes upon the differing

language of the two lower courts to assert that the "Court of Appeals held the school boards were not 'parties' to the action relied on as a bar, which action was brought by the Attorney General of North Carolina." Pet. 1. With this as the lever, petitioner argues that application of res judicata to bar the second action has been made to turn upon "the nebulous doctrine of privity" (*id.*), with resulting denial of petitioner's constitutional and statutory rights and a conflict with other circuits. Descriptive legal terms apart, however, it is clear that both the claim and the real parties in interest are the same in the two suits. Accordingly, the holding below was both correct and consistent with the decisions of other circuits on which petitioner relies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Joint Brief For The Respondents In Opposition was served upon counsel for Petitioner, J. Nat Hamrick, Esq., Hamrick & Hamrick, P.O. Box 470, Rutherfordton, North Carolina 28139, by first class mail with proper postage affixed, this 17th day of June, 1981.

/s/ ST. JOHN BARRETT
BARNETT, ALAGIA & CAREY
1627 K Street, N.W.
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APPENDIX

LISTING PURSUANT TO RULE 28.1

Each of the respondents has the following named parent companies, subsidiaries or affiliates:

BILTMORE COMPANY

The Alterennens Co.

BORDEN, INC.

Adria S.A. Productos Alimenticios (Brazil)
Modelos Yuki (Mexico)
Bayamon Can Corporation, Inc. (New Jersey)
Borden Chemical Co. (France) S.A. (France)
Establissments P. Barnier S.A. (France)
Feslente Boniface S.A. (France)
Borden U.K. Limited (England)
Borden Espana, S.A. (Spain)
Borden International Packaging Ltd. (Ireland)
Crecspan S.A. (Spain)
Este, S.A. (Spain)
Gallina Blanca, S.A. (Spain)
Naturin, S.A. (Spain)
Promocion de Marcados S.A. (Spain)
Rifacli, S.A. (Spain)
Klemme GmbH & Co. K.G. (West Germany)
Borden International Phillippines Inc. (Phillippines)
Borex, S.A. (Panama)
Productos Donita, Inc. (Puerto Rico)
Clover Brand Dairies Corporation (North Carolina)
Coco Lopez Manufacturing Corp. (Puerto Rico)
Cia Chiricana de Leche S.A. (Panama)
Adria S.A. Producios Alimenticios (Brazil)
Alimentos S.A. (Colombia)
Borden Chemical (M) SDN BHD (Malaysia)
Compania Casco S.A.I.C. (Argentina)
Lacteos S.A. (Colombia)
Cia Industrial de Alimentos S.A. (Colombia)
Las Amigas del Pueblo (Panama)
Materiales Moldeables S.A. de C.V. (Mexico)

Nassau Dairy Products Ltd. (Bahama Island)
Grand Bahama Dairy Products Ltd. (Grand Bahama)
Prolesa S.A. de C.V. (Mexico)
Derivados Industriales Veracruzanos S.A. (Mexico)
Lechas Pasterurizados de Libras S.A. (Mexico)
Productos de Leche S.A. (Mexico)
Proteinas Lacteas y Alimentos S.A. (Mexico)
Italcolor S.A. (Uruguay)
Compania Casco S.A.I.C. (Argentina)
Compania Quimica Borden S.A. (Panama)
Galloway-West Company, Inc. (Wisconsin)
Clemco, Inc. (Illinois)
Hitachi Borden Chemical Products, Inc. (Japan)
Illinois Nitrogen Corporation (Illinois)
Industrias La Famosa, Inc. (New Jersey)
Indufor S.A. (Luxembourg)
Produits Lambiotte Freres S.A. (France)
Societe d'Application de Flockage (France)
TRL (France)
John Robert Powers Attractions, Inc. (New York)
Kansas Krop Service, Inc. (Kansas)
Kerry Cheese Tek Limited (Ireland)
Korea Borden Chusik Joesa (Korea)
Latin America Agribusiness Development Corp. (Panama)
Indufor S.A. (Luxembourg)
Meiji Borden, Inc. (Japan)
Monichem, Inc. (Louisiana)
Nassau Dairy Products, Ltd. (Bahama Island)
Quimica Borden Ecuatoriana S.A. (Ecuador)
Quimica Borden S.A. de C.V. (Mexico)
Shahdnab Company (Iran)
Sun-Vue Fertilizers, Inc. (Texas)
Trinidad Processing Company, Ltd. (Trinidad)
The Viking Engraving Corporation (Ohio)

COBLE DAIRY PRODUCTS COOPERATIVE, INC.

None

PET, INC.

Helvetia Redevelopment Corporation
Hussmann Refrigerator Co.
American Refrigeration Products, S.A.
Hussmann Refrigeration, Inc.
Hussmann Store Equipment Limited
Krack Corporation
Alton Manufacturing Co.
Star Cooler Corp.
Chesley Industries
Merchants Refrigerating Company
Merchants Refrigerating Company of California
Nine-O-Five Stores, Inc.
St. Louis Lithographing Company
Southland Canning & Packing Co., Inc.
Stuckey's, Inc.
Stuckey's Stores, Inc.
Vendome Stores, Inc.
Spartanburg Dairy, Inc.
Applied Air Systems, Inc.

PINE STATE CREAMERY CO.

JRAC Systems, Inc.
Novel Foods, Inc.

KRAFT, INC.

Dart & Kraft, Inc.
Dominion Dairies, Ltd.

FLAV-O-RICH, INC.

Dairymen, Inc
D.I. Tank Service, Inc.
D.I. Research, Inc.
Promotion Services, Inc.
Southern Dairymen, Inc.
Pro-Co Cooperative, Inc.

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JUN 30 1981
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CLERK

No. 80-1994

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE NASH COUNTY BOARD OF EDUCATION,

PETITIONER,

versus

THE BILTMORE COMPANY; BORDEN, INC.;
COBLE DAIRY PRODUCTS COOPERATIVE, INC.;
PET, INC.; AND FLAV-O-RICH, INC.,
FOR ITSELF AND AS SUCCESSOR IN INTEREST
OF UNITED DAIRIES, INC.,

RESPONDENTS

Reply Brief of Petitioner

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ARGUMENT ON NEW MATTER

Petitioner files this Reply Brief in response to new matter brought forward in Respondents Brief in opposition.

FIRST

Respondents assert that:

> "the petitioner does not now contend that the earlier state court judgment lacked finality, that it was anything other than a judgment on the merits, or that the earlier action sought relief for anything less than all injury and wrongs for which relief is sought in the second proceeding."
> (Res. Brf. Page 4).

This statement is not correct -- on page 11 of Petitioner's Brief is found the following:

> "NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby . . ."

Thus, it is apparent on the face of the State's judgment that it is <u>not a judgment on the merits</u>.

In fact, the State's case was settled before all the Defendants had filed answers.

It is also apparent that the instant case sought relief different from and in addition to the relief granted in the consent judgment between the State itself and the Defendants.

That State judgment recovered no damages for anybody and only provided for future injunctive relief and that only after reciting"

> "and the parties hereto desire to consent to the entry of this judgment without the said consent judgment constituting evidence of, or being construed as, an admission by either party with respect to any issue of fact or law." (Pet. App. Page 97) (Emphasis added).

It did not ever purport to settle the claims for the school boards -- this is shown by the judgment itself to which the school boards were not parties and to which the school boards did not consent. (Pet. App. Page 98).

This is further shown by the fact that the Attorney General, both before the judgment

was signed and at the time of the signing, informed the Respondents that he was not settling for the school boards, (Pet. App. page 97).

His letter (written after the signing of the judgment) never mentioned damages except to tell the school boards they were free to pursue their treble damage claims (App. This Reply Brief Page 4) and recites that the State's judgment:

> "requires the defendants to adhere to the following terms (without admitting violations of the law occurred.):" (App. This Reply Brief page 2) (Emphasis added).

The Attorney General's letter (written after the signing of the judgment) also shows it was the first time he had told the school boards of his action:

> "Based on the information obtained from our investigation, we filed an action against several processors . . ." (App. This Reply Brief page 1) (Emphasis added).

Surely the fact that the Attorney General obtained an injunction to prohibit future violations of the antitrust laws could not

preclude action by the school boards to recover treble damages sustained by them for past violations of the antitrust laws.

Such actions are normally brought against antitrust violators by persons injured after the F.T.C., the Justice Department or any other Court has entered consent judgments requiring future compliance with the antitrust laws.

SECOND

The doctrine of res judicata itself shows definitively that the Consent Judgment in this case will not support the plea. In 46 Am Jur 2d §394, page 558, the doctrine is set forth as follows:

> "Literally, res judicata means a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. As stated in many cases, the doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." (Footnores omitted).

The Consent Judgment was not rendered on the merits and so states on its face:

> "NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby..." (Pet. App. Page 98).

Since the Court of Appeals held that the Nash County Board of Education was not a "party" to the Consent Judgment, but was in privity, it becomes important to analyze the nebulous term privity.

> "Privity is not established, however, from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts, or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action. The term "privy" when applied to a judgment or a decree refers to one whose interest has been legally represented at the trial. It has been declared that if the interests of two groups of persons were in conflict at the time of the first action, they are not privies within the meaning of the doctrine. A trial in which one party contests his claim against another should be held to estop a third person only when it is realistic to say that the third person was fully protected in the first trial. There can be no such privity between persons as to produce collateral estoppel unless the result can be defended on principles of fundamental fairness in the due

process sense." 46 Am Jur 2d §532, Pages 685-686, (Footnotes omitted) (Emphasis added).

The ruling below certainly can not be defended on principles of fundamental fairness. The school boards recovered not one cent for millions of dollars of illegal overcharges, nor can it be defended under due process because there was no notice, no hearing, no opportunity to be heard and no consent on the part of the school boards.

The Respondents cite In re Armored Car Antitrust Litigation, 645 F. 2d 488, which was handed down on May 21, 1981, subsequent to the filing of the instant petition, in support of their contention that the North Carolina Attorney General had authority to settle the claims of the school boards.

However, in the instant case, both the Attorney General and school boards say that, regardless of any authority he may have, he did not settle for them and so informed the Respondents.

In Armored Car, supra, the Attorney General

specifically said he was opting out of the class action for the State of Maryland:

> "on its own behalf and on behalf of its political subdivisions, including but not limited to, all Maryland county and local governments and State, county, and local governmental agencies, commissions, school boards, hospitals and universities, hereby requests to be excluded from the consitional class and the proposed settlement. (Emphasis ours)".

and the three boards of education who had filed claims stated:

> "their assumption that the Attorney General's action was on their behalf and in accord with their intent at the time is was taken." Armored Car, supra, Page 492.

The decision specifically says on page 493:

> "We need not reach in this case the question of whether political subdivisions must follow the decisions of the Attorney General, or the question of whether subdivisions may discharge the Attorney General and act on their own behalf, because there is here no dispute as to whether the subdivisions desire the Attorney General to act as their attorney. The evidence establishes that they do. If there were doubt as to the representational status of the Attorney General, it was resolved by the subsequent ratification of the opt-out request by the three claimant subdivisions."

IN THE INSTANT CASE, BOTH THE ATTORNEY GENERAL

AND THE SCHOOL BOARDS SAY HE DID NOT REPRESENT THEM.

Armored Car, supra, specifically sets forth that political subdivisions are "persons" under the antitrust laws where they say on page 492:

> "[1] That political subdivisions are 'persons' under the federal antiturst laws and have independent standing to bring federal antitrust actions, Chattanooga Foundry and Pipe Work v. Atlanta, 203 U.S. 390, 27 S.Ct. 65, 51 L. Ed 241 (1906), and that 'political subdivisions' has been interpreted as including counties, cities, towns and villages, Maryland-National Capital Park and Planning Commission v. Montgomery County, 267 Md. 82, 93, 296 A.2d 692, 698 (1972)".

This is in exact accord with the position taken by Petitioner and the Attorney General of North Carolina -- to wit -- that even if he had the authority to represent the school boards, he did not represent them.

Surely the Courts should not hold that the Attorney General represented the school boards and settled their case when the Attorney General himself says he did not and the school boards say he did not.

For the reasons set forth in the Petition, in the Attorney General's Amicus Brief and in this Reply Brief, it is respectfully submitted that the Petition should be graned and the doors to the Halls of Justice should be opened to the school boards because:

1. They were neither parties nor privies to the State's action or the State's judgment.

2. The Consent Judgment in the State's action is not a judgment on the merits.

Respectfully submitted, this 29 day of June, 1981.

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APPENDIX TO

PETITIONER'S

REPLY BRIEF

APPENDIX TO PETITIONER'S REPLY BRIEF

State of North Carolina
Department of Justice
P. O. Box 629
Raleigh
27602

Rufus L. Edmisten
Attorney General

June 18, 1975

MEMORANDUM

TO: School Superintendents and Food Service Directors

FROM: Rufus L. Edmisten
Attorney General

R. L. E.

RE: School Milk Bid Case

I am writing to thank you for your assistance in our investigation into bid rigging practices by milk processors to public school systems. Based on the information obtained from our investigation, we filed an action against several processors alleging that they had, at various times since February, 1970, joined in agreements, combinations, and conspiracies in restraint of trade in the sale of milk and milk products to the public school systems of North Carolina. (Emphasis added)

We are pleased to advise you that the litigation has been settled and that a consent judgment signed by the defendants Biltmore Dairy Farms, Inc.; Borden, Inc.; Coble Dairy Products Cooperative, Inc.; Maola Milk and Ice Cream Company; Pet Incorporated; Pine State Creamery Company; Kraftco Corporation; and Flav-O-Rich, Inc. has been filed in Wake County Superior Court. A copy of that judgment is available from this office on request.

The judgment requires the defendants to adhere to the following terms (without admitting violations of the law occurred):

(1) Defendants are prohibited, directly or indirectly, from fixing the prices of fluid milk, ice cream, or cottage cheese to be charged to any school system in the future.

(2) Each bid will be determined independently, with the defendant sending a copy of the bid to this office.

(3) Any negotiated price must be filed by the defendant with this office.

(4) Upon written request by this office, the company will supply a written description of the means by which the price was determined.

(5) Annual reports are required from each defendant detailing the steps taken to advise its personnel of their obligations under the terms of the judgment.

In view of the relief the Attorney General was able to obtain by consent, combined with the uncertainties and costs inherent in what most certainly would have been protracted litigation, it was felt that this settlement of the case would provide the greatest benefit to the State at the least possible risk. (Emphasis added)

If the Attorney General feels a defendant is not complying with the terms of the judgment, he may seek enforcement and sanctions in the Superior Court, which has retained jurisdiction until May 12, 1978. We would, of course, seek your cooperation in helping us enforce the judgment by reporting any activities of

the defendants that you feel may violate the terms of the judgment. (Emphasis added)

Additionally, it should be pointed out that the settlement in no way proscribes actions by individual school systems to recover monetary damages for overcharges that resulted from the rigging of bids. (Emphasis added)

If you have any questions or information concerning this matter, please feel free to contact this office.

AFFIDAVIT

JOHN M. SILVERSTEIN, first being duly sworn, avers:

1. That he is an attorney licensed to practice law in the State of North Carolina.

2. That on June 18, 1975, he was the acting Special Deputy Attorney General in charge of the Antitrust Section of the North Carolina Department of Justice.

3. That on June 18, 1975, in his capacity as acting Special Deputy Attorney General, he caused to be sent out a memorandum dated

June 18, 1975, to School Superintendents and Food Service Directors in North Carolina from Attorney General Rufus L. Edmisten regarding the School Milk Bid Case.

4. That on or about June 18, 1975, the aforesaid memorandum was in fact placed in envelopes addressed to all School Superintendents and Food Service Directors in North Carolina by personnel in the Antitrust Section of the North Carolina Department of Justice; and that, to the best of his information and belief, said envelopes were deposited in the United States mail at Raleigh, North Carolina.

This the 7th day of September, 1977.

/s/John M. Silverstein

Certificate of Service

This is to certify that the undersigned, a member of the bar of this Court, served at least three copies of this Reply Brief upon all of the parties to this action by depositing said brief in the United States mail, postage prepaid, addressed to their attorneys whose names and post office addresses are:

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No. 81-1994

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versus

THE BILTMORE COMPANY; BORDEN, INC.; COBLE DAIRY PRODUCTS COOPERATIVE, INC.; PET, INC.; AND FLAV-O-RICH, INC., FOR ITSELF AND AS SUCCESSOR IN INTEREST OF UNITED DAIRIES, INC.,

RESPONDENTS.

REPLY TO "SUPPLEMENTAL BRIEF" OF THE RESPONDENTS

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REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF

This Reply Brief is submitted pursuant to Rule 22.6 because Respondents, by taking statements out of context, have cast doubt upon the statements regarding the record which were set forth in the amicus brief for the State of North Carolina.

On pages 4 and 5 of Respondents' Supplemental Brief, the Respondents take out of context certain questions and answers which materially misinterpret the testimony of Deputy Attorney General Jean Benoy.

In order that the Court may have the real meaning of this testimony we will quote the testimony immediately preceding the questions and answers quoted by Respondents, then quote the questions and answers quoted by Respondents underlined, and then quote the testimony immediately following the questions and answers quoted by Respondents.

On pages 145, 146 and 147 of Volume II of

the Benoy deposition is found the following language:

"Q. I said if you had pressed the complaint filed in 1974 and proceded to a trial in the case, would you have sought damages in the event of a judgment that a conspiracy existed which damages would have represented the injury that you alleged was suffered by school systems in the State of North Carolina involving the sale of milk by dairy processors in this State?

A. Assuming that the court had established a class under Rule 23 and given notice and they had not all opted out and were present in the suit, I certainly would have, but that was not a decision that would be left up to me as to whether to press it or not, you see. Something had to happen subsequent to filing of the complaint alleging the damages here, which was the establishment by the court of a class and notice given and them having an opportunity to come forward. I am sure you know that you cannot claim damages on behalf of a class member who has excluded himself from the class and is not present representing his claim.

BY MR. DUESENBERG:

Q. What was the authority under which you brought this lawsuit?

A. G.S. Chapter 75 and Chapter 114-2.

Q. And is Chapter 114 the section of code of the state that pertains to the authority of the Attorney General's--

A. The duty of the Attorney General, yes. Chapter 75 says, I believe it is 75-14 or 15, somewhere there, the duty of the Attorney General to prosecute actions by the state. 75-16 says, gives the right of action for treble damage for violations of the terms of the chapter, so all of those were the authorizations to bring the action, bring the lawsuit.

Q. And they were the premise for your pursuing as a representative of the public school systems in this state?

A. Oh, yes. That is to bring the action.

Q. Is there any provision in the North Carolina--strike that please--was there any provision in Rule 23 of the North Carolina Rules of Civil Procedure concerning certification of a class in 1974?

A. No, there is not. Our Rule 23 is substantially identical to the old Rule 23 of the Federal Rules of Civil Procedure. It does not track the revised Rule 23 which provides for that, but the lead case under the old Federal Rule is Union Carbide versus Neesely, Neesely versus Union Carbide, I think that is reported under 300 Fed., Second, and Judge Murrah was the author of the opinion. It was a 2, 1 decision tried by Joe Aliola if you remember that case, and in that case the class action was permitted to proceed with a trial by jury and that was under the old Rule 23 of the Fed.'s Rule of Civil Procedure at that time which was substantially identical to ours."

In addressing the second point raised by Respondents as Point 2 of their brief and set forth on page 4, they say:

> "The State implies that there was a parole agreement among the parties to the state action giving the consent judgment a meaning different than its term expressed."

It is impossible to understand the basis of Respondents' statement when the basic position of Petitioner and of the State in this action is that there were no other terms that could be included in the consent judgment entered into between the Attorney General and the Respondents in the state action other than expressly stated in the consent judgment. We again reiterate that there is not a single reference in the pleadings in the State of North Carolina case nor in the consent judgment which even inferentially could be interpreted as including the local boards of education in either the lawsuit or the consent judgment <u>without previously establishing a class action under Rule 23, which was never done</u>.

Under Subsection 3 of Respondents' brief, they say:

> "The Attorney General asserts that the respondents 'considered the idea' of joining the local school boards as parties to the state court proceeding, but 'rejected' the idea."

Respondents further state:

> "This assertion has no support in the record, and the Attorney General does not cite any."

The true facts are that the Benoy deposition is replete with the statement that there was no possible way the local boards of education could be bound by the settlement unless either

1. A class was formed, or

2. They were given notice of the settlement and an opportunity to be heard.

The Court's attention is called to the following testimony contained in Benoy deposition of May 4, 1977, Volume I, at page 97:

> ". . .and in that conversation, he [Defendants' Attorney Boyce] said, what they want to do is foreclose all claims and he said how would you propose could we do that and I said I said I couldn't propose that we do that. But he said, but that is what

the defendants want. He said, and if we settle it and that would foreclose them all on the class action and I told him that I didn't see how that could be because we had not established a class and that if that is what he wanted, it seemed to me that that would defeat the purpose of all the confidentiality that he had been expressing concern about, the desire for confidentiality because I told him as I understood the methodology that is used for establishing a class, you have to move the court to establish a class. You have to give notice to the class. And that involves, as I understand the class action requirements of the rule and the case law, that would require a notice to them of any intended settlement.

Q. A notice to whom?

A. To the members of the class. It would give them an opportunity to opt out of the class or the settlement proposal. That it would allow them to appear with their, other individual class members could appear with their own lawyers who would not be bound by any of our discussions, and if the desire was to settle all claims of all alleged class members, that that would absolutely probably open the door to further litigation and would not accomplish the result that he wanted. And so I said, that would be, that is the problem with the class action.... At any rate, I was telling him before you can estop anybody, they got to be able to come into court. You know, have an opportunity to be heard. The, so I

told him, at any rate I said to dispose of this case, I should think that establishing a class would be the exact, I probably used the word 180° off course. I said if, if you want to argue or do anything else you could if you want to, you know, have a basis for trying to estop them later, arguably we could follow the U.S. Justice Department route by filing notice in the Superior Court of an intention to settle our action and give a, give notice to the alleged class members who might be affected and give a 30 day waiting period for them to come in and file any objections that they might have to our proposed settlement, and the agreed terms that we had; those were the only two methods that I knew by which our action of settlement might foreclose the class members of, if a class were ever established, that is you would have to establish the class, the other one would be to give them notice, an opportunity to come in and object to the settlement as it might affect their interest.

Q. And what was done in response to your suggestion?

A. Well, a period of time passed, it seems to me it was a short period of time and let's see, he indicated himself he was not that familiar with Rule 23 or the U.S. Justice Department procedure. He said he would contact his client. It seems he came back and told me that, in substance that the defendants did not want either the class action route or us filing a notice in the Superior Court. That, now that is my recollection of what was said and, right in

there you see, we had agreed at least in principle that our costs would be paid to us and not filed in court and then he wanted to see a rough draft of what we were proposing in the way of a reporting system. And that was given to him.

The record further reflects that on the day of the signing of the consent judgment between Attorney General Edmisten and Mr. Dixon for Respondents, the following occurred:

> "And then we, just, when the Attorney General said, are you going to sign the judgment Benoy, I said no, it is prepared for your signature and he said, well, let's see it. And he said, well, now at that point in signing this we are not settling any claim except the State's, and, in substance, Mr. Dixon said that that was the chance that they were taking. Chance or risk or words to that effect. I don't remember the precise words spoken.
>
> Q. That who was taking?
>
> A. That the defendants would take that risk. That was, and he signed it and then there was another lawyer there."

Further in the record, is the deposition of Mr. Gordon Eugene Boyce, who was counsel for defendant Pine State Creamery, and who was the negotiator of the settlement for all of the

defendants. Mr. Boyce testified in a deposition in this action as follows:

"Q. All right. Now, Mr. Boyce, state whether or not during the settlement discussions a question was ever considered as to whether or not the defendants wanted to settle the claims of local boards of education, as well as the claims of the state?

A. There were discussions by me with at least Mr. Benoy, relating to the subject of the manner in which similar cases had been handled in the past. Those discussions did relate to such matters as to whether or not any consent judgment or any final judgment would have to be filed with the Court for some period of time to be held open for other parties, if any, to intervene. There were discussions relating to whether or not there would have to be a certain indication of the class; whether or not notices would have to be sent out, and we did discuss procedures along those lines.

Q. And state whether or not you also discussed whether or not the Judge would have to make a finding that a settlement was fair and reasonable to the class members, if it did in fact attempt to settle the claims of other members of the class.

A. I think it would be fair to say that Mr. Benoy discussed that with me. I did not discuss that with him, because there was not any part of my responsibilities to engage in any substantive discussions that I recall."

In Respondents' fourth item beginning on page 5 of their brief, Respondents seek acceptance of the proposition that the school boards were not entitled to legal, procedural and substantive due process of law because they were visited by some investigative officers and there was subsequent newspaper publicity. Surely this is not the law of the land.

Item 5 of the Respondents' Supplemental Brief, page 6, quarrels with the State's characterization of its action in the State court seeking injunctive relief as a parens patriae action. Respondents' contention here is that because such parens patriae allegations do not appear on the face of the State's Complaint in State Court the Attorney General is foreclosed from here asserting the nature of the State's action. Yet the Respondents quarrel with the State's assertion that the Attorney General "acted expressly and solely under the authority of G.S. §75-14-16. . . . which relates only to antiturst and consumer protection actions." The Complaint shows on

its face that G.S. §75-14 and G.S. §75-16 were the only authority asserted by the Attorney General in the State action, which paragraph reads as follows:

> "B. JURISDICTION AND VENUE
>
> 3. This is a civil antitrust action seeking permanent injunctive relief as provided for in G.S. §75-14 and money damages as provided for in G.S. 75-16, against each of the defendants, jointly and severally, as named in paragraph 2 above."

As to Item 6 of Respondents' Brief, Respondents quarrel with the Attorney General's assertion that the money damage it was seeking in the State action covered the State's "direct purchases of fluid milk from Respondents". The Respondents further state at pages 7 and 8 of their Supplemental Brief:

> "This is consistent with the fact that the extensive investigation by the State preceding the filing of this lawsuit related only to milk sales to local school districts."

and they refer to the deposition of SBI Agent Donald Jones.

The Court's attention is called to the Jones deposition, Volume I, at pages 6 and 7

as follows commencing at line 23 of page 6:

"We received a specific inquiry from an employee either in the Department of Public Instruction or School Food Service and the inquiry concerned the prices that the various school systems were receiving for milk.

Q. And approximately when was that?

A. To the best of my recollection it must have been in 1969. It could have been in early 1970 but it was when we were initially assigned to the Consumer Protection Division. I can't pinpoint the date better than that at this time. . ."

And on page 9 at line 21:

"Q. All right. You stated earlier that the Consumer Protection Division received a complaint from one of the employees of a dairy, will you tell us about that?

A. I believe that complaint was from a State employee who worked with the Department of Public Instruction or School Food Service Division."

and on page 30, Volume II dated June 7, 1977:

"Q. And from whom did you receive such complaints, if you can identify it?

A. The specific complaint that I recall concerning the price of milk was from as I said yesterday, from the Division of Public Instruction, or an employee of the School Food Service Division, and I believe that person's name was, or is, Donny Pollard."

and see Jones Deposition Volume II dated June 7, 1977, pages 30-34.

It is clear then that every statement made by the Attorney General in his amicus brief is correct and amply supported by the evidence of record.

Respondents attempt to convince this Court that when the State of North Carolina used the words or phrase "public school system" in its complaint it was describing "units of local government only". However, on pages 6 and 7 of Respondents' Brief, Respondents admit the State's Complaint clearly shows on its face that the Attorney General brought the action on the State's "own behalf as a direct purchaser of fluid milk from the defendants," and the record amply demonstrates that the initial complaint to the Attorney General was from a State official in a state department of public instruction.

CONCLUSION

Petitioner and the Attorney General of North Carolina respectfully submit to the Court that the record was correctly set forth in their respective briefs. They regret that Respondents' "Supplemental Brief" made necessary the filing of this reply. All the testimony when taken in context shows that there was never any question about the fact that the judgment bound only the state and that none of the local boards of education knew about, consented to or were bound by that judgment.

Respectfully submitted, this 3rd day of September, 1981.

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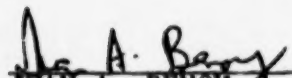

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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SUPPLEMENTAL BRIEF OF THE RESPONDENTS IN RESPONSE TO THE BRIEF OF THE STATE OF NORTH CAROLINA, AMICUS CURIAE

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SUPPLEMENTAL BRIEF OF THE RESPONDENTS IN RESPONSE TO THE BRIEF OF THE STATE OF NORTH CAROLINA, AMICUS CURIAE

This supplemental brief is submitted jointly by the respondents under Rule 22.6 in response to the brief *amicus* filed by the Attorney General of North Carolina on behalf of the State of North Carolina on June 19, 1981, two days after the filing of respondents' joint brief in opposition. This brief addresses only matters newly raised by the State.

The State of North Carolina, reiterating the position it took as *amicus* in the Court of Appeals, asserts that the earlier state court judgment did not bind its local school boards because the state attorney general, in bringing the earlier action, did not intend that either he

or the State would thereby represent the interest of the local boards.[1]

While the Attorney General, in speaking for the State, asserts that he had authority under state law to vindicate fully the legal interest of the local school boards, with or without their express authorization, he contends he chose not to do so and instead decided to represent their interest only through the class action mode. The Attorney General argues that the determinations of the two courts below, each adverse to the Attorney General's contention, are in error and will have a "chilling effect" upon his future prosecution of state antitrust actions. NCBr 15.[2]

The *amicus* brief presents no basis for the granting of a writ of certiorari. It agrees with the rulings below that the state attorney general had ample authority to represent the local school boards in the state court proceeding and to obtain full relief on their behalf without relying upon the certification of a class action. NCBr 6-7. It does not quarrel with the conclusion of the two courts below that the antitrust laws of North Carolina essentially replicate federal antitrust law and that the State had the right to the same relief, both on its own behalf and on behalf of all of its local school boards, in the state proceeding that it would have in federal court. See Pet.App. 19-21, 62, 69. Nor does the State assert

---

[1] In the Court of Appeals the state attorney general asserted that this was the *only* issue and that if the attorney general did "*actually* represent Nash County (or any other board of education) in the state action," then "the judgment below is proper and should be sustained." Amicus Curiae Brief of the State of North Carolina, page 7. The attorney general fully argued this issue in the Court of Appeals and it was resolved adversely to him.

[2] We will refer to the State's brief here as "NCBr."

that the claims in the state and federal court were different. What the State *does* urge — and *all* that it urges — is that both courts below erred in determining as a mixed finding of fact and conclusion of law that the attorney general represented the local school boards in the state proceeding as chief legal officer of the state and not merely as representative of a class consisting of all school boards. But this contention provides no ground for still further review by this Court. Indeed, only within the last month, in *Federated Department Stores, Inc.* v. *Moitie*, 49 U.S.L.W. 4687, 4688 n.2 (U.S., filed June 15, 1981), this Court reiterated its adherence to the settled principle that it will not ordinarily review determinations by the lower federal courts on the "real nature" of a pleading.

Despite the failure of the State to present any grounds for certiorari, we believe it necessary that we respond to several seriously misleading statements in the *amicus* brief. A description of these statements and our comments follow:

1. The Attorney General emphasizes that in filing the state court action he "acted *expressly and solely* under the authority of G.S. §§75-14-16 . . . which relate only to antitrust and consumer protection actions." NCBr 6. For emphasis, he adds that "[t]he provisions of G.S. 114-2 were never mentioned in the State's action." *Id.* He then faults the two lower courts for finding that he exercised his more general authority under §114-2. This is in marked contrast to statements by Mr. Jean Benoy, the deputy state attorney general who signed the State's *amicus* brief in this Court, when in a deposition

taken on May 4, 1977, he was asked these questions and gave these answers:

> Q. What was the authority under which you brought this [the state] lawsuit?
>
> A. G.S. Chapter 75 and Chapter 114-2.
>
> Q. And is Chapter 114 the section of code of the state that pertains to the authority of the Attorney General's —
>
> A. The duty of the Attorney General, yes. Chapter 75 says, I believe it is 75-14 or 15, somewhere there, the duty of the Attorney General to prosecute actions of the action. 75-16 says, gives the right of action for treble damage in violations of the term of the chapter, so all of those were the authorizations to bring the action, bring the lawsuit.

Deposition of Jean Benoy, May 4, 1977, Vol. II, 146-147; Appellant's Appendix in the Court of Appeals, Vol. II, pp. 177-78.

2. The State implies that there was a parole agreement among the parties to the state action giving the consent judgment a meaning different than its terms expressed. NCBr 1. Even if such speculation was not precluded as a matter of law (see *United States* v. *Armour & Co.*, 402 U.S. 673 (1971)), it is flatly contradicted by the record. Mr. Benoy testified on deposition in this case:

> Q. Other than the consent judgment signed by Flav-O-Rich and the consent judgment of which we have been speaking, signed by the other defendants, you know of no other written agreements?
>
> A. No, I don't.

Q. Do you know of any oral agreements between Borden and the Attorney General relating to the settlement of the Attorney General's case?

A. No, I do not.

Q. Do you know of any oral agreements between any other defendants and the Attorney General?

A. No, I do not.

Q. That in any way modifies what is in the consent judgments?

A. Not to my knowledge. I know of none.

Q. And is it correct that the terms of the settlement between the Attorney General and all of the defendants in the case are the terms set forth in that consent judgment?

A. So far as I know, yes. Everything that I know of that was agreed to is set forth there.

Deposition of Jean Benoy, May 5, 1977, Volume II, pp. 156-57, Appellant's Appendix in the Court of Appeals, pp. 202-03.

3. The Attorney General asserts that the respondents "considered the idea" of joining the local school boards as parties to the state court proceeding, but "rejected" the idea. NCBr 10. This assertion has no support in the record, and the Attorney General does not cite any. In any event, the framing of the state court complaint was in the hands of the State, not of the respondents.

4. In arguing that petitioner Nash County "never had a full and fair opportunity to present its evidence and argument in support of its claims" and that it "neither knew of nor consented to the State's Consent Judgment" (NCBr 2), the State implies that Nash County was ignorant of the Attorney General's actions. As

noted by the Court of Appeals below, such a suggestion is "somewhat disingenuous" and "[i]t imposes too much [on] credibility to suggest that the School District was ignorant of the Attorney General's action."[1] Pet.App. 82. Further, this argument ignores the findings of the two courts below that the petitioner had the opportunity for a full and fair hearing through its statutorily authorized representative, the attorney general.

5. The Attorney General asserts that he filed the State's action in state court "to protect the state's general economy and to enforce the State's policy prohibiting combinations in restraint of trade, i.e., a *parens patriae* action." NCBr 11. This assertion flies in the face of his pleading in state court. The allegations of his complaint and the relief sought related *only* to sales of milk to the local school boards. Indeed, the Attorney General himself in 1977 described the state case as the "School Milk Bid Case." Appendix to Petitioner's Reply Brief, AP1 and AP5.

6. The Attorney General asserts that the money damages it was seeking in the state action covered the State's "*direct purchases* of fluid milk from respondents." NCBr 11. Again, this is flatly contradicted by the Attorney General's state court pleading. Although paragraph 4(a) of the state complaint recites that the State is bringing the action on its "own behalf as a direct purchaser of fluid milk from the

---

[1] The Court of Appeals more specifically noted:

> The School District knew the Attorney General was investigating, with a view to litigation, the purchases of milk by the school districts. He had sent investigators to this School District and these investigators had reviewed those records. The School District thus knew that the Attorney General contemplated filing his action. Later the Attorney General gave wide publicity to the institution of his action.
>
> [Pet.App. 82]

defendants," as well as on its own behalf "as one of the sources of revenue used to pay part of the purchase price of fluid milk by the various public school systems of North Carolina" (Pet.App. 87), there are no allegations in the complaint (nor reference in the later consent judgment) to *any* direct purchases by the State or any state agency other than the local school boards. The "PRODUCT AND GEOGRAPHIC MARKET" described by the State in ¶7 of the state complaint was "fluid milk, ice cream and cheese sold to public school systems within the State of North Carolina." Pet.App. 90. The violation alleged was a "conspiracy in restraint of trade in the sale of milk products to the public school systems of North Carolina." Pet.App. 92. The alleged overt acts in furtherance of the conspiracy were that "defendants at various times continuously since February, 1970, either have submitted identical bids or limited service bids to public school systems in North Carolina." Pet.App. 92-93. The "EFFECTS" of the conspiracy were alleged to be:

> (a) Price competition in the sale of fluid milk to the public school systems in North Carolina has been restrained and eliminated;
>
> (b) Prices paid for fluid milk purchased by the public school systems in North Carolina have been at unreasonably high, artificial and noncompetitive prices.
>
> [Pet.App. 93-94]

In short, the state complaint not only failed to allege any illegal sales to agencies or persons other than the local school boards, but the allegations affirmatively stated that the *only* complained-of activities were directed solely to the local boards. This is consistent with the fact that the extensive investigation by the State preceding the

filing of its lawsuit related only to milk sales to local school districts. Deposition of Donald Jones, June 7, 1977, pp. 44-45, set forth as an Appendix hereto.

7. The Attorney General asserts that the state action sought "monetary damages to the state for its prior *indirect purchases* of fluid milk from Respondents." NCBr 11-12. But *no* indirect purchases by the State were alleged. Although the State contributed financially to the direct purchases by the local school boards, the State did not repurchase any of the milk from the local school boards. Accordingly, the Attorney General's reference to *Illinois Brick Co.* v. *State of Illinois*, 431 U.S. 720 (1977), is inapposite.

8. The Attorney General asserts that the effect of the rulings below is to create an irrebuttable presumption that the Attorney General, "as a matter of *res judicata* under federal law," has fully exercised his authority to represent "every person he is authorized to represent in actions he institutes on behalf of the State." NCBr 13. In so asserting, the Attorney General misperceives the holdings of the two lower courts. Those courts have simply held upon the facts of this particular case that the Attorney General, contrary to his assertion here, did effectively represent the interest of the local school boards in the state court proceeding. These holdings, which are a mixed determination of fact and of state law, are amply supported by the record.

CONCLUSION

The *amicus* brief of the State of North Carolina suggests no reason for review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Supplemental Brief Of The Respondents In Response To The Brief Of The State Of North Carolina, Amicus Curiae was served upon counsel for Petitioner, J. Nat Hamrick, Esq., Hamrick & Hamrick, P.O. Box 470, Rutherfordton, North Carolina 28139, and upon counsel for the State of North Carolina, Jean A. Benoy, Esq., Deputy Attorney General, Western District Office, P.O. Box 790, Forest City, North Carolina 28043, by first class mail with proper postage affixed, this 24th day of July, 1981.

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APPENDIX

APPENDIX

Deposition Of Donald Jones, June 7, 1977, Part II, p. 44, line 1 — p. 45, line 13; Appellant's Appendix In The Court Of Appeals, p. 223.

Q. In your period of time of investigating the dairy industry in the State of North Carolina, did you ever make any investigations of the price at which milk was sold by processors in North Carolina to hospitals in the State of North Carolina?

A. No, sir. I don't recall one.

Q. Did you ever make any investigation respecting the sale of milk by processors in North Carolina to prisons located in the state?

A. No, sir. I did not.

Q. Did you ever make investigation with respect to the price of milk sold by processors in North Carolina to universities located in North Carolina?

A. No, sir.

Q. Did you ever make any investigation with respect to the price of milk sold by processors in the State of North Carolina to any other state agency in the State of North Carolina?

A. Not that I recall.

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No. 80-1994

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE NASH COUNTY BOARD OF EDUCATION,

PETITIONER,

versus

THE BILTMORE COMPANY; BORDEN, INC.;
COBLE DAIRY PRODUCTS COOPERATIVE, INC.;
PET, INC.; AND FLAV-O-RICH, INC.,
FOR ITSELF AND AS SUCCESSOR IN INTEREST
OF UNITED DAIRIES, INC.,

RESPONDENTS

[redacted]Brief of The State of North Carolina Appearing, Amicus Curiae, In Support of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Motion for Leave to File the Attached Brief of The State of North Carolina Appearing, Amicus Curiae, In Support of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

NOW COMES the State of North Carolina, through its Attorney General, and moves this Honorable Court for leave to file its Brief

pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States, in support of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

RESPECTFULLY SUBMITTED, this the 19th day of June, 1981.

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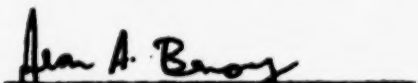
Attorney General of
North Carolina



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I. INTEREST OF THE STATE OF NORTH CAROLINA IN APPEARING AS AMICUS CURIAE

A. The Court of Appeals held in this case that the State, through its Attorney General, by settling the State's injunction and damage action for its direct purchases, forever barred a multi-million dollar treble damage antitrust action of the city and county boards of education for their direct purchases from Respondents -- this in spite of the fact the boards were not named as party plaintiffs in the prior action; that the Attorney General told Respondents prior to settlement, and at the time the Consent Judgment was signed, that he was not settling for the boards of education; never mentioned them as parties to the Consent Judgment; and signed that Judgment on behalf of the State only.

The Attorney General specifically informed the Courts below of the above facts in his briefs, oral argument and deposition testimony. Yet the District Court held the city

and county boards of education were "parties" to the State's action while the Court of Appeals held they were not. Instead the Court of Appeals used the concept of "privity" to support its holding of res judicata in bar of Petitioner's claims even though: it has its own independent standing to sue under both state and federal antitrust law; it never had a full and fair opportunity to present its evidence and argument in support of its claims; and neither knew of nor consented to the State's Consent Judgment.

B. The Court of Appeals decision disregards and limits the discretion of the State Attorney General of North Carolina. In the State's case, he elected to represent the State directly; and, the school boards only in the event a class action was certified by the Superior Court and then only as their class representative. The Court of Appeals opinion ignores his exercise of discretion and holds

that he did bind the school boards for purposes of res judicata even though he expressly did not.

C. If the decision of the Court of Appeals stands it will seriously interfere with the enforcement of the antitrust laws in North Carolina because the Attorney General can never be sure whom he will bind by his representation, and consequently both the commencement and settling of antitrust cases in North Carolina will be considerably chilled.

II. SUMMARY OF THE ARGUMENT

A. The doctrine of res judicata cannot bar a person from litigating his claim unless that person has had one fair and full opportunity to present his evidence and argument in support of his claim and has failed in that effort. Here Petitioner has never had any opportunity to do so. Thus, by the Court of Appeals decision, Petitioner has been denied constitutional guarantees of due process of law.

B. In State of Florida, ex. rel. Shevin v. Exxon Corp., 526 F. 2d 266 (5th Cir. 1976), that Court gave effect to and enforced the discretion as exercised by the Florida Attorney General in that case. Here, the Court, while citing Florida v. Exxon, has not. Instead, the Court gives no effect whatsoever to the discretion actually exercised by the Attorney General which discretion is lawfully granted to him by North Carolina law.

C. The duties of the Attorney General of North Carolina are found in literally hundreds of statutes in fourteen volumes of the General Statutes of North Carolina. Among them is the duty to enforce the State's antitrust policy and laws. Wide discretion is allowed him as to the manner, means and actions he may maintain to enforce this policy. If permitted to stand, the decision below will have a chilling effect upon the exercise of his discretion because he can not now know whose claims he is disposing of.

III. ARGUMENT

Introduction

"The facts . . . are not in dispute", Nash County Board of Education v. The Biltmore Co., et al, 640 F. 2d 484, 485 (4th Cir. 1981) (Pet. App. p. 43). However an examination of the record reveals that crucial matters stated as facts by the courts below and relied upon in their opinions are, in fact, erroneous.

In the District Court's Memorandum of Decision, 464 F. Supp. 1027, 1037, (E.D.N.C. 1978), (Pet. App. p. 38) the Court states:

> Because the Attorney General [in the State action] acted pursuant to the broad, unencumbered authority, he did not require explicit consent from the constituent school boards in order to bind them to the terms of the decree. (Emphasis added)

and the Court is referring to G.S. 114-2, (3A Part II, General Statutes of North Carolina, Replacement 1978, p. 248), 464 F. Supp. at 1033, (Pet. App. pp. 24-25). G. S. 114-2 is set out fully in Appendix "A" attached hereto.

In fact, the Attorney General acted expressly and solely under the authority of G.S. §§ 75-14-16 (2C General Statutes of North Carolina, Replacement 1981, pp. 269-271) (Pet. App. pp. 127-128) which relate only to antitrust and consumer protection actions. The provisions of G.S. 114-2 were never mentioned in the State's action (Pet. App. pp. 85-104).

Yet, based solely upon the general authority of the Attorney General to act under G.S. 114-2, supra, in all matters, the District Court at 464 F. Supp. 1036 (Pet. App. p. 35), held:

> . . . the Court concludes, that by virtue of the Attorney General's participation in the prior state court antitrust action, Nash County was a 'party' in that action for purposes of res judicata. (Emphasis added)

Clearly the District Court made its decision solely upon what authority the Attorney General generally possesses instead of what authority the Attorney General actually exercised in the state action. It was on the mere existence of such general authority that the

District Court held Petitioner to be a "party" to the State's prior action.

The Court of Appeals states, however, 640 F. 2d at 493, (Pet. App. p. 72):

> In this case, there is no contention that the plaintiff was a party to the earlier suit begun in the name of the State of North Carolina by its Attorney General, which ended with a consent judgment. The defendants did claim, though, that the plaintiff in this suit was in privity with the plaintiff in that earlier action by the Attorney General and thus is bound by the consent judgment therein.

The District Court never mentioned "privity". In fact, the District Court noted at 464 F. Supp. 1030, (Pet. App. p. 11):

> "As will be explained more fully below Nash County was a party plaintiff in the Attorney General's state antitrust action."

Next, the Court of Appeals stated that other of the crucial essential facts upon which its decision turned were:

> . . . [The Attorney General] identified the parties he asserted the right to

> represent as 'each public school system . . .' 640 F. 2d 485, (Pet. App. p. 44)
>
> * * * *
>
> Both suits deal with the same subject matter, i.e., the purchase of fluid milk and milk products solely by the various school districts in North Carolina. They involve no other purchases . . . 640 F. 2d at 488, (Pet. App. p. 54) (Emphasis added)

while the District Court correctly noted that:

> The Attorney General was suing on behalf of the state as a direct purchaser of milk from the defendants . . . 464 F. Supp. 1034 (Pet. App. p. 26) (Emphasis added)

and for injury sustained by the State as "one of the sources of revenue used to pay part of the purchase price of milk bought from the [Respondents] by [Petitioners]" Id. I.e., for its injury as an indirect purchaser. Additionally, "he sued as the purported class representative . . ." Id., of each public school system as well as for "permanent injunctive relief". Id. See ¶1 of the Attorney General's complaint (Pet. App. pp. 85-88) for a clear statement of whom the party plaintiff was in the state's action, and ¶4 to see in what capacity the Attorney General sought to

represent "each public school system".

Clearly, the Attorney General at the pleading stage was only alleging a class action and in his prayer for relief he requested the Court to establish such a class. (Pet. App. p. 94).

A. THE STATE'S ACTION UNDER STATE LAW IN STATE COURT DID NOT, AND CONSTITUTIONALLY COULD NOT, BAR PETITIONER'S SUBSEQUENT DAMAGE CLAIMS UNDER THE FEDERAL ANTITRUST LAWS IN FEDERAL COURT, UNDER THE DOCTRINE OF RES JUDICATA.

In a significant case involving a plea of res judicata, Blonder-Tongue Lab., Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971), Justice White, speaking for a unanimous Court, said:

> . . . the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.
>
> Some litigants -- those who never appeared in a prior action -- may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or

> more existing adjudications of the identical issue which stand squarely against their position. See Hansberry v. Lee, 311 U.S. 43, 40 (1940). (Emphasis added)

Moreover, as stated in Restatement of the Law of Judgments § 79, p. 357, American Law Institute, St. Paul, Minn. (1942) even

> [i]f a person is named as a party to the action but is neither named nor otherwise described in the judgment, he is not a party to the judgment and is not affected by the decision of issues leading to it; . . .

In Parklane Hosiery Co., Inc. et al v. Shore, 439 U.S. 322 (1979), Justice Stewart noted in footnote 13, at 330, that application of estoppel would be denied if the party asserting it "could have affected joinder in the first action between himself and his present adversary" and declined to do so. Here Respondents considered the idea and rejected it.

The facts of the State's action in state court are that on October 21, 1974, the Attorney General, in the exercise of his discretion, as authorized by G.S. 75-14, 15, and 16, (Pet. App. pp. 127-128) instituted an action against

Respondents on behalf of the State of North Carolina which was the only named plaintiff (Pet. App. pp. 85-86). In that action, he sought:

(1) permanent injunctive relief against Respondents' future violations of the state's antitrust laws (Pet. App. p. 85 (Caption), p. 94 (Prayer 1,d)), to protect the state's general economy and to enforce the State's policy prohibiting combinations in restraint of trade, i.e., a parens patriae action which the State unquestionably has standing to do, even though the State cannot recover damages for injury to its general economy. Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972);

(2) monetary damages to the State for its prior direct purchases of fluid milk from Respondents, which it clearly has standing to do; (Pet. App. p. 87);

(3) monetary damages to the state for its prior indirect purchases of fluid milk from

Respondents. This Court has subsequently held the State has no standing to sue for such damages. Illinois Brick Co., v. State of Illinois, 431 U.S. 720 (1977); and

(4) to establish the action as a "class action" under Rule 23 of the North Carolina Rules of Civil Procedure, G.S. 1A-1, Rule 23, (1A General Statutes of North Carolina, Replacement 1969, p. 640) which would have included Petitioner if the Court has established such a class and if Petitioner, subsequent to establishment of such class did not opt out of the action. But no class was ever established.

B. THE FEDERAL COURTS SHOULD NOT INTERFERE WITH THE LAWFUL DISCRETION AS EXERCISED BY THE ATTORNEY GENERAL REGARDING AN ACTION HE INSTITUTED FOR THE STATE.

In Florida, ex. rel. Shevin v. Exxon Corp., 526 F. 2d 266 (5th Cir. 1976), the United States Court of Appeals for the Fifth Circuit affirmed the authority and discretion of that State's Attorney General to bring

units of local government into an action as named parties without their prior consent. However, Shevin does not stand for the proposition that simply because the Attorney General possesses general authority and wide discretion to represent the State and units of local government, this alone, as a matter of law, makes them all parties to cases he brings on behalf of the State, whether he names them as parties plaintiff or not.

As the Attorney General has the discretion and authority to positively bring local governments into an action as parties with the State, he has the correlative discretion and authority to refrain from bringing them into an action as parties with the State.

The decision of the Courts here effectively hold that as a matter of res judicata under federal law, the Attorney General can not refrain from representing every person he is authorized to represent in actions he institutes on behalf of the State. The Shevin case dictates no such result.

The Attorney General further contends that he is authorized and has the requisite discretion to do as he did in the State's action against Respondents here, which was to institute an action by the State; request the court to certify the action as a "class action" under Rule 23, so that members of the alleged class, (the local boards of education) after notice, would have the option at their discretion to: (1) stay in the class as parties to the action with the Attorney General acting as their counsel; or (2) to stay in the class as parties with counsel of their own choosing; or (3) to "opt out" of the class and go their own way under Rule 23 of the North Carolina Rules of Civil Procedure. See Eisen v. Carlisle and Jacquelin, 391 F. 2d 555 (2nd Cir 1968).

The decision here effectively prevents the use of Rule 23 by the State and the Attorney General. No decisions of any courts, federal or state, prior to the case here reach such a result and the general authority granted to the Attorney General contemplates

no such result.

C. THE DECISION OF THE COURT BELOW, IF ALLOWED TO STAND WILL HAVE A CHILLING EFFECT UPON THE EXERCISE OF DISCRETION OF THE ATTORNEY GENERAL IN ANTITRUST LAW ENFORCEMENT IN THE PERFORMANCE OF HIS LAWFUL DUTIES.

The decision below, if allowed to stand, must have a chilling effect on the Attorney General of North Carolina when he contemplates commencing or settling an antitrust action under the express and specific duty to enforce the State's policy and laws to prevent and prohibit illegal combinations in restraint of trade because, under the decisions below, the Attorney General can no longer rely on the effective exercise of his discretion. Simply put, he can not now know whose claims he may be representing or disposing of even when he explicitly names only the State as the plaintiff.

In the State's action used as a bar to the Petitioner's action in federal court, the Attorney General specifically indentified who the singular party plaintiff was, i.e., the State of North Carolina. (Pet. App. p. 85)

The Attorney General identified who the Defendants were (Pet. App. p. 86). The Attorney General's reference to the "various public school systems in North Carolina" was as a reference point as one of the sources of injury to the State and thus such indirect purchases were part of its claim for damages. (Pet. App. p. 87).

Additionally, ¶4b of the State's complaint describes "public school systems" for the purposes of identifying who was to be included in the class action <u>if</u> the class action was certified. There is no reference whatsoever to local "public school systems" otherwise being parties plaintiff in the state's action.

In the Consent Judgment, the parties to it are clearly set forth. (Pet. App. p. 97). There the judgment recites

> from statements . . . made by counsel for the Defendants mentioned in the caption above and counsel for the Plaintiff . . . all matters . . . have been agreed upon and settled in a manner satisfactory <u>both to the Plaintiff</u>,

State of North Carolina and to the the aforementioned defendants. (Pet. App. p. 97) (Emphasis added)

There is no reference in the Consent Judgment to any local boards of education ever being parties to the action in the first instance or parties to the judgment in the second instance.

The judgment obtained required the Respondents to do certain things in the future, with reference to the Attorney General. Specifically, each defendant was required to forward copies of all bids and negotiated prices to any public school system within the State of North Carolina to the Attorney General. (Pet. App. pp. 99, 101). The language of the consent judgment which refers to the "public school systems" are not references to them as parties but are only reference points to enable the Respondents and the Attorney General to know with precision precisely what submissions were to be made to the Attorney General by the Respondents in complying with the judgment entered.

IV. CONCLUSION

The State of North Carolina, as Amicus Curiae, requests this Court to:

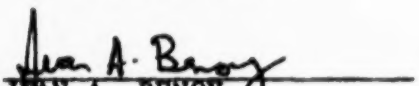
1. Grant Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit;

2. Vacate the decisions of the Court of Appeals and the U.S. District Court for the Eastern District of North Carolina; and

3. Remand the case to the District Court for further proceedings to enable the Petitioner to have one full and fair opportunity to present its evidence and arguments in support of its claims and those of the class it seeks to represent.

RESPECTFULLY SUBMITTED, this 19th day of June, 1981.

RUFUS L. EDMISTEN
Attorney General of
North Carolina



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§ 114-2, General Statutes of North Carolina

§ 114-2. **Duties.** — It shall be the duty of the Attorney General:

(1) To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.

(2) To represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State.

(3) Repealed by Session Laws 1973, c. 702, s. 2.

(4) To consult with and advise the solicitors, when requested by them, in all matters pertaining to the duties of their office.

(5) To give, when required, his opinion upon all questions of law submitted to him by the General Assembly, or by either branch thereof, or by the Governor, Auditor, Treasurer, or any other State officer.

(6) To pay all moneys received for debts due or penalties to the State immediately after the receipt thereof into the treasury.

(7) To compare the warrants drawn by the Auditor on the State treasury with the laws under which they purport to be drawn.

(8) Subject to the provisions of G.S. 62-20:

a. To intervene, when he deems it to be advisable in the public interest, in proceedings before any courts, regulatory officers, agencies and bodies, both State and federal, in a representative capacity for and on behalf of the using and consuming public of this State. He shall also have the authority to institute and originate proceedings before such courts, officers, agencies or bodies and shall have authority to appear before agencies on behalf of the State and its agencies and citizens in all matters affecting the public interest.

b. Upon the institution of any proceeding before any State agency by application, petition or other pleading, formal or informal, the outcome of which will affect a substantial number of residents of North Carolina, such agency or agencies shall furnish the Attorney General with copies of all such applications, petitions and pleadings so filed, and, when the Attorney General deems it advisable in the public interest to intervene in such proceedings, he is authorized to file responsive pleadings and to appear before such agency either in a representative capacity in behalf of the using and consuming public of this State or in behalf of the State or any of its agencies.

APPENDIX "A"

Certificate of Service

This is to certify that the undersigned, a member of the bar of this Court, served this Amicus Curiae Motion and Brief in support of Petitioner's Petition for a Writ of Certiorari upon all of the parties to this action by depositing three copies of the Motion and Brief in support, in the United States Post Office at Forest City, North Carolina with first class postage prepaid addressed to the following counsel of record whose names at their post office addresses are as follows:

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